

1 STATE OF NEW YORK : NASSAU COUNTY

2 COUNTY COURT PART 11

3 - - - - -X

4 THE PEOPLE OF THE STATE OF NEW YORK, SCI/IND. NO.
167N-05

5 -against-

TRIAL

6 MARK ORLANDO,

Defendant.

7 - - - - -X

8 252 Old Country Road
9 Mineola, New York
June 13, 2005

10

11

12 B e f o r e:

13 HON. DAVID P. SULLIVAN, County Court Judge

14 A p p e a r a n c e s:

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16 HON. DENIS DILLON
District Attorney, Nassau County
17 By: ROBERT T. HAYDEN, ESQ.
Assistant District Attorney

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20 DENNIS LEMKE ESQ.
Attorney for Defendant
262 Old Country Road
21 Mineola, N.Y. 11501

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23 Mary Ocskai
Official Court Reporter

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Proceedings

1 THE CLERK: Continued case on trial,
2 167N-2005, People versus Mark Orlando.

3 May we have appearances, please, for the record.

4 MR. HAYDEN: Robert T Hayden for the People.

5 THE CLERK: For the defendant.

6 MR. LEMKE: Dennis Lemke, 114 Old Counsel
7 Road, Mineola, New York, Your Honor.

8 THE CLERK: People ready?

9 MR. HAYDEN: Ready, Your Honor.

10 THE CLERK: Defense ready.

11 MR. LEMKE: Ready, Your Honor.

12 THE CLERK: Let the record reflect the
13 presence of Mr. Orlando. The jury is not in the
14 courtroom at this time.

15 THE COURT: Just for everybody that is here,
16 what the Court intends to do is to do a precharge
17 conference now on the record with the attorneys.

18 Both sides have seen the suggested verdict sheet?

19 MR. LEMKE: Yes.

20 MR. HAYDEN: Yes.

21 THE COURT: Any objection?

22 MR. HAYDEN: No.

23 MR. LEMKE: None, Your Honor.

24 THE COURT: We will mark it as the next Court
25 exhibit, Mr. Paoli.

Proceedings

1 For the record, after the proceedings concluded on
2 Friday, the Court, off the record, went over with both
3 attorneys the charge it intended to give to the jury.
4 There will be some introductory preface remarks.

5 Court will discuss the indictment, facts for the
6 jury. Law for the Court. Unanimous verdict. Verdict
7 based on evidence alone. We will again give the charge
8 with respect to jury note taking. Juror expertise.
9 They're not to apply any of their expertise to
10 anything. No sympathy for the jury. The jury's not to
11 consider sentence. Remarks of counsel are not
12 evidence. Jurors' recollection of the facts govern.
13 They're to disregard any excluded matter. They're to
14 make no inference from my rulings.

15 I will give the charge on direct and circumstantial
16 evidence. Then I will give the general charge on
17 credibility of witnesses. I will give the charge again
18 on police witness. No greater, no lesser credibility.

19 With respect to the expert witness charge we
20 discussed, I will just give the general charge on expert
21 witness. I won't name all the detectives that were made
22 experts.

23 Is that acceptable?

24 MR. LEMKE: Yes.

25 MR. HAYDEN: Yes, Your Honor.

Proceedings

1 THE COURT: I will give the charge with
2 respect to credibility, and someone who has priors, I
3 believe the only witness that testified that there was
4 indication of a prior conduct with the law was Tommy
5 Flores.

6 Is that correct?

7 MR. HAYDEN: Yes.

8 MR. LEMKE: Yes.

9 THE COURT: I will direct them on how to
10 reconcile discrepancies. False in uno, false in
11 omnibus. An overview, sum up the whole credibility
12 evaluation. I will direct them that testimony and
13 charge to be read back and exhibits taken into the jury
14 room. I will give them the charge with respect to the
15 oral statements and the oral statements reduced to
16 writing by detectives.

17 I will give a full charge on voluntariness and
18 whether your client's rights were given to him and
19 weighed. And, of course, that there needs to be
20 corroboration of any such statements. I will again give
21 the jury the limiting instruction with respect to
22 Detective McGinn's statements allegedly made by Herva
23 Jeannot. Give them a general charge on photographs,
24 maps and diagrams.

25 I will give them the CJI charge on motive. Then I

Proceedings

1 will do presumption of innocence, burden of proof,
2 define reasonable doubt.

3 Mr. Lemke, are you asking that the jury be charged
4 begin with the defendant's failure to testify?

5 MR. LEMKE: Yes, Your Honor.

6 THE COURT: I will charge the jury on
7 accessorial liability. And then I will give them the
8 specific law on the only count charged against the
9 defendant Murder in the Second Degree.

10 Now, as I indicated, counsel, we all went over this
11 off the record and now I have done it on the record. At
12 this time are there any requests to charge or
13 objections?

14 MR. HAYDEN: No, Your Honor.

15 MR. LEMKE: None, Your Honor.

16 THE COURT: Both sides have anything before
17 the jury is brought in?

18 MR. HAYDEN: No Your Honor.

19 MR. LEMKE: Nothing further, Your Honor.

20 THE COURT: Okay.

21 Again, the admonitions, everybody has been
22 cooperative, but I admonish everybody, there's not to be
23 any disruptions during the proceedings. Any disruptions
24 will be swiftly dealt with. You will be banded from the
25 proceedings.

Proceedings

1 THE COURT OFFICER: Ready for the jury, Your
2 Honor?

3 THE COURT: Yes, ma'am.

4 THE COURT OFFICER: Jury entering.

5 THE CLERK: Continued case on trial,
6 indictment 167N-2005, People of the State of New York
7 against Mark Orlando.

8 Again, People ready.

9 MR. HAYDEN: Ready, Your Honor.

10 THE CLERK: Defense ready?

11 MR. LEMKE: Defendant ready.

12 THE CLERK: Let the record reflect the
13 presence of Mr. Orlando, sworn jurors and the
14 alternates.

15 THE COURT: Good morning, ladies and
16 gentlemen.

17 Now, bear in mind, that we have allowed note
18 taking, but at this stage of the trial there will be
19 summations. What the attorneys say is not evidence.
20 So, you should be paying attention to what they say, not
21 so much worrying about taking notes. This is not
22 evidence.

23 Just so you know how I am going to proceed, Mr.
24 Lemke will sum up. I will take a five minute break for
25 anybody to use the facilities and then Mr. Hayden will

Proceedings

1 sum up and I will again take the break so everyone can
2 use the facilities. Then I will charge you on the law.

3 Members of the jury, we have now reached that point
4 where you're about to hear the summation, the closing
5 arguments of counsel. Following summation, I will
6 charge you or instruct you as to the laws, rules and
7 principles which you must follow during your
8 deliberations in rendering your final verdict.

9 Defendant's attorney, Mr. Lemke, will sum up first,
10 and Assistant District Attorney, Mr. Hayden, will sum up
11 last.

12 Suffice to say during their summations counsel will
13 review the evidence presented at this trial, and will
14 suggest to you certain conclusions which they in their
15 opinion believe may be properly drawn from the
16 evidence. This is the purpose of summations.

17 If you find a particular analysis of the evidence
18 as suggested by one of the attorneys to be correct and
19 accurate, and if you find the conclusions you're asked
20 to draw therefrom to be logical and sensible, then you
21 may adopt that analysis and/or or conclusion as your own
22 either in whole or in part. On the other hand, if you
23 find a particular analysis and/or conclusion to be
24 illogical or not warranted, you may disregard the same
25 and draw your own conclusions from the evidence which

Proceedings

1 you find to be credible.

2 Bear in mind, that nothing either counsel may say
3 in their summations is evidence in this case, nor will
4 anything I may say in my instructions on the law be
5 evidence. You have heard the evidence, you and you
6 alone are the sole and exclusive judges of the facts in
7 this case.

8 Mr. Lemke will now begin his summations.

9 MR. LEMKE: Thank you.

10 May it please the Court, ladies and gentlemen of
11 the jury, Mr. Hayden, good morning.

12 Before I comment on the evidence in this case or as
13 I will point out the lack of evidence in this case. On
14 behalf of Mr. Orlando, his family, myself, we would like
15 to thank you for being such attentive jurors. As you
16 can see now, during that voir dire process, these are
17 very serious charges.

18 You can see also when we discussed during voir dire
19 how significant and important it is to be a fair juror,
20 and a fair jury collectively. You made sacrifices to be
21 here. It's been a relatively short trial for charges of
22 such seriousness as Murder in the Second Degree. You
23 made sacrifices. Your life has been altered for the
24 rest of your life regarding those sacrifices and your
25 responsibilities here as jurors. We appreciate that.

Proceedings

1 We appreciate the sacrifices that you have made.

2 Now, before I begin commenting on the evidence or
3 lack of evidence in the case, I get to go first I don't
4 know if it's an advantage or a disadvantage, but I know
5 when I am done, I come back over here, and I sit next to
6 my client, Mark Orlando, Mr. Hayden, will be given the
7 opportunity to stand up and address you. And he will
8 say, Mr. Lemke makes this argument, Mr. Lemke made that
9 argument. Mr. Hayden will try to make arguments of his
10 own. Try to say, well, that argument that Mr. Lemke
11 made doesn't make any sense. He is going to try to
12 rebut the arguments that I make. And I don't get a
13 chance to get back up here like you saw during the
14 trial, whose getting in the last word, whose saying what
15 at the end.

16 So, I ask each of you to play devil's advocate for
17 me, for Mark. Ask yourselves what would Mr. Lemke have
18 said regarding that argument. It would be nice actually
19 if Mr. Hayden and I could go into the jury room with
20 you, make our arguments, argue with you various points.
21 You know you'd never get a unanimous verdict. Shouldn't
22 have our opinions count as far as reaching a verdict,
23 but be able to discuss it further. So, we take the time
24 now to argue to you, submit to you, what the evidence or
25 lack of evidence that is shown in this case.

Proceedings

1 Additionally, during voir dire, during jury
2 selection, you all made promises. You made promises
3 that you would keep an opened mind throughout this
4 case. That you would hold the prosecutor to his burden
5 of proof in this case. That you wouldn't expect me, on
6 behalf of my client, to prove or disprove anything.
7 That you could follow Judge Sullivan's instructions on
8 the law, regarding presumption of innocence, and the
9 other instructions that you're now going to get.

10 Additionally, also, you may have reasonable doubts
11 of your own. This courtroom is perhaps one the most
12 hottest courtrooms in this courthouse. You know, I
13 think sat in five different courtrooms. The fact I am
14 up here now, I think by now you know I am not relatively
15 long, I like to get to the issue, I like to get to the
16 point and ask you to consider that.

17 Consider the instructions that Judge Sullivan will
18 give you. The fact I don't mention anything doesn't
19 mean that you're not to consider that when you're
20 talking about a reasonable doubt. You still don't know
21 what reasonable doubts is. The Judge will instruct you
22 on that. That in part it is not a whim or a guess or a
23 surmise. That it's a reasonable doubt, that if you are
24 sitting there talking about the case, deliberating, that
25 somebody will say, well, wait a second, we heard from

Proceedings

1 Mark in his statement he gave to Detective Cereghino how
2 this occurred, or wait a minute, we heard from the EMT
3 when he arrived. The fact I don't mention it now does
4 not mean you're not to consider it. It only means I am
5 human. It's hot in here. I like to get certainly to
6 the point regarding this. So, please consider that.
7 Talk about that.

8 The issue for you to consider, I think I hopefully
9 clearly laid out during openings. You're not going to
10 have to consider whether or not Mark Orlando was
11 somewhere else on December 3, 2004. You're not going to
12 have to consider, you're not going to have to worry
13 about whether or not this is a self-defense case.
14 You're not going to have to consider lesser included for
15 murder, for manslaughter and so forth. We discussed
16 that. I told you in my opening don't waste your time
17 considering any of that. It's whether or not the People
18 have proven, beyond a reasonable doubt, that Mark
19 Orlando aided and abetted Herva Jeannot in the
20 intentional murder of Mr. Calabrese.

21 There is also no question, no dispute Mr. Calabrese
22 was viciously murdered. No question about that. No
23 question about where the murder took place.

24 The question is, has Mr. Hayden proven to your
25 satisfaction, beyond a reasonable doubt, that Mark

Proceedings

1 Orlando knew what was happening, took part in it,
2 encouraged it, as you will get told the definition of
3 aiding and abetting. Not, after the fact, whether he
4 was scared and threatened for his life and his wife, he
5 went here and there.

6 We will talk a bit about that. I like to break my
7 summations into three parts. Basically that is what you
8 need to consider. That is the sole issue in this case.
9 And I during my summation will not go through ten
10 exhibits of the same spot to show we have this and
11 that. Because, as I asked to you during voir dire, it's
12 not the quantity or the number of witnesses or
13 photographs, but the quality as to what was said. How
14 does that help me in making that determination.

15 So, what do we know, let's talk about what is not
16 in dispute, and let's first talk about who was this Mark
17 Orlando. You heard who Mark Orlando is. You heard from
18 a number of witnesses. I may not name the witnesses by
19 name in part because there were a lot of the officers
20 and so forth. It's, again, not who they are, but what
21 they said in connection to this case.

22 So, when you are deliberating, and somebody's
23 getting perhaps confused one way or the other about what
24 was said, whose Mark Orlando, you have to start off from
25 that, and that point, to determine, have they proven

Proceedings

1 that Mark Orlando has the mental capacity, that Mark
2 Orlando could perform such a vicious aiding and abetting
3 intent. Was he involved. Did he know there was a
4 robbery that was going to be committed by Herva
5 Jeannot.

6 Whose Mark Orlando? Well, you heard he is
7 thirty-four years of age. You heard from Barbara, and
8 you heard from Tom. You heard that both of them had
9 worked with Mark for a number of years. That Barbara
10 has known Mark the longest. She described Mark.

11 Again, anything I say, if it either strikes you
12 that it may not have been said doesn't mean I am doing
13 it intentionally. You can ask to have the reporter read
14 it back.

15 But Tommy Flores testifies as does Barbara.
16 Barbara testifies she knows Mark, longest. That is
17 correct. Mark was thirty-four years of age back on
18 December 3, 2004. That Mark lived in Bayshore at that
19 point with his wife who was pregnant. Not in dispute.
20 That they lived 1119 Joselson Avenue. Somewhat
21 significant because we know, we learned that Herva
22 Jeannot lives in Deer Park. And so that Mark would then
23 pick up Herva Jeannot, then drive to Professional Credit
24 Services where they had worked. And Mr. Hayden will
25 argue in a way that this is a friendship, how could they

Proceedings

1 not know what each one is doing.

2 Clearly you know that many times you have
3 relationships with someone, you know, friends, you know
4 them three or four years, you can be driving that person
5 a number of days, three, four, five days a week, then
6 all of a sudden they do something that seems, I can't
7 believe that person did that. You wouldn't think that
8 person would be capable of doing that. Mr. Hayden's
9 going to make those arguments for you to consider.

10 What else about Mark? We know that Mark now has a
11 three month old daughter. What is significant about
12 that? Not sympathy, but his wife was pregnant at the
13 time that Mr. Herva had threatened Mark. Threatened to
14 kill his wife if he said anything. Because that is
15 something you're also going to be given to consider.
16 Here's a vicious murder. Why didn't Mark go to the
17 police. I think you see now the answer to that. When I
18 discussed how it was that he gave the first version to
19 the one detective, McHugh, and then to Detective McGinn,
20 finally to Detective Cereghino. Because everything that
21 Mark Orlando had told Detective Cereghino is
22 corroborated by the sixty or so exhibits introduced into
23 evidence. Everything here supports what Mark had said.

24 What Mr. Hayden's going to ask you to consider is
25 to speculate, to speculate how the holes got into the

Proceedings

1 sweat shirt, and about the angle of the body, an the
2 manner in which the body was first shot and the first
3 shot that penetrated Mr. Calabrese. But you heard from
4 Mark in that statement to Cereghino. We will talk about
5 each one of those factors because it's all supported by
6 all of this evidence.

7 So, you know that Mark, and most significant, was
8 extremely overweight. I think to the tune of close to
9 seven hundred pounds. That Mark had a number of
10 operations, and then they were trying to conceive,
11 trying to have a child. That Barbara had indicated that
12 Mark, keep in mind, not one of these witnesses ever said
13 that Mark was ever aggressive with anyone. That either
14 he argued with anyone, was violent with anyone, in fact,
15 if anything, maybe he over compensated for himself.

16 What else did Mark do. Mr. Hayden said a number of
17 times, well, you know that mark had money, he had all
18 these winnings, because he told you so. I got up here
19 on cross and asked not only did he tell you so, but he
20 had cash, he held the cash, had it a week before Bobby
21 Calabrese is shot. Because they're going to have to lay
22 out a motive. Judge Sullivan will tell you, and
23 correctly so, Mr. Hayden doesn't have to prove a motive
24 in this case. Not at all. You can consider lack of
25 motive, consider that in determining the viciousness of

Proceedings

1 this murder, whether Herva Jeannot saw an opportunity,
2 who he believed to be a runner, without Mark knowing
3 about it. We will talk about that because that is what
4 it comes down to.

5 But what else do we know about Mark Orlando. He
6 was working at the same location, same job about si
7 and-a-half years. That on a number of occasions, more
8 than a number of occasions, he'd take them to luncheon.
9 In fact Tommy got up and said, well, I buy my share of
10 lunches. That is fine. But what was more significant
11 was that Mark was a gambler. That Mark was always very
12 generous, always bought things, always flashing money,
13 always talking about it, and backing it up. How so,
14 backing it up. Tommy told you when he went to the gym
15 Tommy Flores didn't have money. Mark, use my credit
16 card. Tommy did. He said when it was Barbara's
17 birthday, within, a month beforehand, before December
18 third, what did Mark do. Not only did Mark take time to
19 go to the jewelry store to buy I think a pendant, a
20 heart, but that Mark said, listen, let's take Barbara
21 out. Let's take her into the city. So, Mark hooked up
22 with a party bus to go into the city. Over forty
23 people. Probably cost thousands. He had paid for the
24 liquor and beer, so forth, and the bus ride to go in.

25 You heard that, and a number of occasions that any

Proceedings

1 time they needed anything, they could go to Mark.
2 Because this begins to show that there is no motive for
3 Mark. Why would Mark need to kill, viciously partake in
4 any type of robbery or murder of Calabrese.

5 What else do we learn about Mark which is
6 significant. Well, he's a gambler. Not only is Mark a
7 gambler, all right, but Mark gambles well. That's just
8 not Mark bragging about how he is wining, you have in
9 evidence mark Orlando's gambling records. This isn't
10 disputed or anything made up from air. Had all this
11 extra money. The gambling records as you will sit
12 through and maybe calculate when they came in, because
13 we know that Barbara and Tommy always hung around with
14 Mark and Herva. They went around together. They went
15 to barbecues together usually at Mark's house with his
16 wife. He was always the center of this. Mark was
17 gambling, always gambling. You will look through the
18 records because, again, don't have to prove motive.
19 There's a lack of movie.

20 There is no reason for Mark to get involved with
21 killing Mr. Calabrese. They weren't after Mark. There's
22 been no testimony Mr. Calabrese said, hey, if you don't
23 pay, I have to have guys come out and rough you up a
24 little bit. Mark, we have to rough you up. We have
25 none of that involved. Nothing like that suggested at

Proceedings

1 all. In fact, there's, you learn, when the money was
2 owed \$17,000 that was owed, it's what was paid, as you
3 can see from the gambling records which is documented
4 the first week, pocket 28 to pocket 31. Short week.
5 Remember what is significant about the gambling records
6 is that you would bet Monday through Sunday, and you
7 would pay up that next Thursday or Friday. That is
8 significant because my client met Mr. Calabrese, he
9 didn't owe what he had lost on Monday, Tuesday,
10 Wednesday, but he had that Monday to pay, so he went
11 there to pay.

12 But what do we know about the gambling records?
13 Well, the first week, which is in evidence, he won over
14 \$8,000. The week from November, that was three days,
15 the week November first, November seventh, was a bad
16 week, only won \$425, but that was due on November
17 eleventh or twelfth because it ended Sunday, pay off
18 Thursday and Friday. November eighth, November
19 fourteenth, Mark won another \$9,800, due to be paid by
20 November eighteenth.

21 There is no question, as in Mark's statement, that
22 many times in this case Mr. Calabrese would come up to
23 Farmingdale. That is not in dispute. You now there's
24 that saying suckers walk, you make bets, you win,
25 great. You could come up to pay me. I lose, I walk

Proceedings

1 down to pay you. There's nothing unusual about that.
2 Mr. Calabrese comes up there, he pays off Mark, he pays
3 off Mark \$8,000, he pays off \$425 the third week.
4 November eighth through November fourteenth, won another
5 \$9,800. You heard from Barbara. This was Mark's second
6 income along with his and his wife's income. What about
7 the fourth week. In fact, the third week, the fourth
8 week, won \$9,800. He was paid around November
9 eighteenth, nineteenth, November fifteenth to November
10 twenty-third, twenty-first, won another \$14,500. That
11 was due and paid to him around November twenty-fifth or
12 twenty-sixth. How do we know he was paid. What did
13 Barbara and Tommy tell you. Barbara tells you five or
14 six days before Mr. Calabrese was shot that they were in
15 the car with Mark, and that Mark was bragging, look,
16 here's all this cash. They wanted to hold it. They
17 held it and they passed it around the car, at least ten
18 grand.

19 What else do you hear. You hear Barbara say that a
20 couple of days, a week before that he had another
21 bundle, \$10,000. A different bundle. So, you add these
22 figures up, already you're talking close to \$32,000 just
23 for that. And the week that Mark loses, it's in the
24 records, is November twenty-second to November
25 twenty-eighth, about \$9,100. That would be due December

Proceedings

1 second or December third in Mark's statement to
2 Cereghino. And there is no question Mark met with
3 Detective McHugh, and he lied about certain things to
4 Detective McHugh. No question, not disputing that. And
5 you heard from Detective McGinn, what happened, we will
6 go over that a little bit, before Mark finally says, now
7 I feel safe. Now I can tell you what happened. I don't
8 want to be the first one, that Herva Jeannot killed
9 Calabrese. I don't want him coming after my family.
10 That is when he gives the third and final statement.
11 It's corroborated what he says about the money.

12 Another thing, Mr. Hayden will get up here and say
13 he's so cold and callous, that none of these officers
14 realized that he had no motive. The only time it gets
15 emotional. The only time he's excited is when he's
16 talking about gambling. You heard that testimony. Mr.
17 Hayden will say, see this guy there, he's got no remorse
18 whatsoever. Well, that was, in fact, the case. Had
19 these officers did not in any way feel that there was
20 any emotion they would have written that down in these
21 notes. Every detective that got up had ten pages of
22 notes, eight pages notes, six pages of notes.
23 Detective's writing everything down. Think this was
24 unusual. Where did you write that down. It's not
25 anywhere.

Proceedings

1 I see the detectives did a good job, excellent job
2 you, now it's playing jury and judge. I have to
3 cross-examine them. Wait a second. Let's take a look
4 at what's in evidence. Let's look at the exhibits and
5 photographs here now. Let's take a look at what you
6 need to consider.

7 So, we know it's in his statement, Mark's talking
8 about the gambling because he is being asked about it.
9 He says, listen, sure, I owed him \$9,100 that week, but
10 I don't owe him next week. That is not due. As a good
11 gambler you ride the waves. When I'm hot, I'm winning.
12 You bet and bet and bet. He is up tremendously. Now he
13 bets week and-a-half, two weeks, he's on a down slide.
14 Bobby cuts off my credit. I am up now a good \$29,000.
15 I pay you back the seventeen, I'm still up. How do we
16 know there's still money, there's at least close to
17 \$3,000 in the safe. When the police went, there money's
18 in checking, money's in savings. You heard them talk
19 about, well, he spent that money.

20 Well, if he's up, in this case, as they discussed
21 over twelve or at one point \$20,000, \$30,000, pays him
22 back, sure he can pay bills, he can do a couple of other
23 things. And the detectives kept saying, well, he was in
24 debt. I don't know, giving the inference that maybe he
25 has to foreclose on his house, he is behind in all his

Proceedings

1 credit bills. That is not the case at all. You have
2 heard that. In fact, everything was up to date. He
3 wasn't in debt as far as the mortgage and foreclosure
4 and so forth, because they need to try to show a motive
5 even though it's not necessary. Why would he do that.
6 He is up all this money. Got to go towards that aiding
7 and abetting. So, you have the gambling records. It's
8 clear, no foreclosures. There no motive here. He is up
9 this money. There is money still in the house. That is
10 in evidence.

11 So now we have the gambling now leads up to the
12 week into December third. Well, you heard from Mark in
13 his statement. Well, what occurred, you heard, also
14 more significantly, from Barbara and Tommy. You hear
15 that that week, at first they say that they were
16 distancing themselves, Herva and Mark, until on cross
17 examination I said, when you say distancing themselves,
18 you work in the same business that Barbara and, Mark and
19 Herva work with Sprint collections. And I asked him
20 about the three days up to December third and he tells
21 you that, oh, yeah, you're right, spent all day at lunch
22 on Wednesday. I think we went to the pub. Mark drove
23 and bought lunch. We came back. On Thursday, oh, yes,
24 Mark drove us to cash our checks. We hung around,
25 grabbed fast food. On Friday we went to Applebees, hung

Proceedings

1 around there. Got off at five o'clock. Mark drove.
2 Okay.

3 In his statement as well, because everything that
4 Mark says to Detective Cereghino is supported by all the
5 evidence. When they're talking to Mark they're not
6 arguing with Mark saying we have this and it shows what
7 happened at this time. Mark is telling them everything
8 that occurred in that statement to Detective Cereghino
9 that is now supported by this evidence at a later time.
10 You didn't hear from somebody later trying to fit in
11 what you heard from Mark when it counted the most. Then
12 six days Mr. Calabrese shot and killed.

13 But he says on that December third, that Mark
14 leaves about five o'clock, he leaves, he's going to go
15 down to the gym. In the car is Herva as well as Tommy
16 and they go to drop Tommy off, then they go to the gym.
17 Barbara admitted there was a bit of an argument.
18 Barbara wanted to go with Tommy. They go to the gym.
19 They leave there. It's Mark and Herva driving to the
20 gym. They get to the gym. Barbara gets there. Another
21 friend gets there. Tommy gets there about six. They're
22 working out. You will see in the statement that is
23 exactly what time Mark said he got there.

24 Also said Herva had went to the store. He had to
25 get some gym clothes. Some things he put in the car

Proceedings

1 earlier that day, we thought it was a gun. You know,
2 Mr. Hayden will argue, this gun got an eight inch
3 barrel. That is a long gun. Long barrel on this that
4 gun. It's a gun in which when you first look at, what
5 is this. How could it be hidden. How Mark could not
6 have seen it. Take a step back. Wait a second. You
7 have Herva. They got their gym shirts on. He buys a
8 sweat shirt like the baggy one, and you know what, not
9 so sure he would have seen something like that.

10 Then he gets out, Herva Jeannot, knows nothing
11 about it except he was in the military, living at home.
12 I think there's some people home at that time. Ever
13 opportunity to make himself some money. We don't have
14 to prove that. Just need to say, wait a minute, Herva
15 is there, there is no dispute Herva shot him, and see
16 here it is on December third, they leave work, they go
17 to Tommy's, Tommy's gets dropped off, they go to the
18 gym. They're all working together, and Barbara says
19 that, sure, Mark's pumping extra weight. He is there
20 and whose the one that's rushing him. Herva. Barbara
21 says Herva keeps saying let's go, let's go. Because now
22 you got to think actions there are that would in any way
23 support that Mark knew what Herva was intending to do,
24 because that is the issue, and what I am arguing, those
25 reasonable doubts, you can now begin to talk about in

Proceedings

1 deliberations. Because Mr. Hayden hasn't overcome
2 that. No matter how many photographs he put in, he
3 brings in a dummy in here to. Again, ask how come
4 there's not a third arrow. Why isn't that here. It
5 doesn't fit into this theory. They want you to
6 speculate. They want you to take circumstances evidence
7 and take it to the next step. You have the, what else
8 do you have. You have, they're at the gym, they leave
9 the gym. Mark and Herva. Mark now tells you that he
10 drives down, and he is going down to Wantagh Suzuki. He
11 will go down, he's the loser, he will go pay the money
12 to Bobby Calabrese.

13 If this is an intentional murder he was involved in
14 and new about it and aided and abetted, don't you think
15 he would have spoken to Calabrese, two in the afternoon,
16 meet you at eleven o'clock at night, twelve o'clock at
17 night. Do you think he's going to call Bobby four or
18 five minutes beforehand and say come meet me down here
19 when he knows Bobby Calabrese is having dinner with
20 somebody. There was a friend that was there. Do you
21 think he is going to sit there and drive down to Island
22 Park to sit there, knowing he is going to call Bobby, he
23 knows he owes him money, he has to pay him at 8:30 at
24 night. You know Mr. Hayden will argue this whole thing,
25 he tried to establish some type of alibi, that he is

Proceedings

1 with Herva and, therefore, he went to take out some
2 money, and then he went to the dealership. Well, we
3 know in Mark's statements that's what happened. And, I
4 got to ask you to consider this for a second. He is now
5 going to Island Park. And Mr. Hayden can argue all he
6 wants, and submit to you that this is a discreet
7 location.

8 Well, I ask you to take a moment and ask
9 yourselves, on a Friday night, at about 8:30, other than
10 perhaps the coliseum perhaps, maybe a stadium, where
11 else would have the most amount of people on a Friday
12 night, starting of the weekend, 8:30 at night, looking
13 for either firewood, beer, cigarettes or food than a
14 7-Eleven, and put that 7-Eleven where there is going to
15 be people all over the place, coming right over the
16 bridge basically and going up a little further north as
17 you can see from all these photographs. That is the
18 bridge that takes you from Long Beach into Island Park.
19 And now go up on Austin Boulevard, which is, no
20 question, is a main thoroughfare. Here's the bridge. I
21 am referring now to People's, one of the People's
22 exhibits, People's 29.

23 And there is no question here's the only way to
24 come in and out. It's a Friday night. When you come up
25 to this location, and there's that 7-Eleven that is

Proceedings

1 there, before you lit Long Beach Road, you're coming up
2 the 7-Eleven, he is talking about fifty feet, on North
3 Broadway, from the parking lot that is lit up. If you
4 take a look at the closeup you will see the right away
5 there's going to be a location where you had from the
6 still video, I don't know, seven, eight or nine cars
7 coming back and forth from the 7-Eleven. You have a cut
8 through that comes through. Is that a location that
9 you're intending, or you knew what Herva was going to
10 do, you're going to go to, or are you going to pick
11 another spot. Mr. Hayden's going to argue, wait a
12 second. All the other times they met were in
13 Farmingdale, maybe over by the parking lot, but that
14 area in Farmingdale, have to worry about cops being
15 around. Let's go down to the 7-Eleven here. I don't
16 want to give it to you in the parking lot because of the
17 police and other things. I'll meet you on the side
18 fifty feet -- you take a look, look at the these. These
19 are in evidence. It's a two lane highway each way.
20 Coming up, this is a 7-Eleven, this is Austin
21 Boulevard. Then you have a little cut through.

22 I ask if you cut through that to come down North
23 Broadway, your headlights are on on the car, are you
24 going to pick a place where as much as they want to
25 argue, did you hear any testimony that the storage place

Proceedings

1 was closed at 8:30. None. In fact, you heard the
2 detective say when they get there at 9:30, the gates
3 were closed. We know from the video the gates were open
4 at 8:30. Also saw the limo service. The limo car was
5 either there or was pulling away. Where's those
6 arguments when you're sitting there, I'm not in there
7 with you. Sit there and take up that argument. You can
8 discuss that.

9 Now, you're there, Mark is there. He says he parks
10 the car. When Mark says in this statement how he parks
11 the car, now he is waiting there for a few minutes.
12 That is consistent with the -- I will refer to the
13 video, you know, there's a lot of testimony about
14 stills, but in the context of the time that Mark got
15 there, no question that Mark lied previously when he
16 spoke to Detective McGinn. Not until, what, there's a
17 change in circumstances, not until he feels safe for his
18 wife and unborn child, he says to Cereghino, 'yes, I
19 parked there. I waited and Herva got out.

20 Remember, not once through all of this did he ever
21 tell these officers he knew what Herva was going to rob
22 Mr. Calabrese or kill Mr. Calabrese. Not once. Says he
23 parks, he is there for a couple of minutes. That is
24 supported by the video. That is supported by the
25 evidence here. People didn't introduce it we would

Proceedings

1 have. It's here. He says he is there, that Herva gets
2 out. Herva is out of the car, says that he takes a
3 piss, urinates. He is waiting. Two minutes later, like
4 he does most of the time, Mr. Calabrese pulls up, Mark
5 gets out of the car, and this is now what you have to
6 look at. This is what you need to begin to say, okay,
7 what are the actions, what do I need to see that is
8 consistent with what Mark says occurs. That is what you
9 will have to do. That is what you should do.

10 Mark says he gets out of the car and approaches in
11 between the two cars. When he approaches Mr. Calabrese,
12 he has in his hands seventeen -- two bundles of money to
13 pay. He's at least fifty feet down from the 7-Eleven.
14 Here the side street cuts across. Okay. Here's the car
15 and it's very significant now to take a look at the way
16 the body's laying with the feet to Mr. Calabrese's car,
17 and the head closer to where Mark was parked because
18 that is significant when you're going to take a look at
19 the T-shirt and the sweat shirt which may be placed on
20 the presenter. When the bullet holes line up, because,
21 how did that bullet hole get through the left side of
22 the sweat shirt. How did that happen when it came
23 through. Well, Mark tells you how that happened and so
24 does this detective. So does that dummy that was here.
25 Because Mark tells you it's consistent, direct evidence,

Proceedings

1 not speculation about the sweat shirt being pulled over
2 his back and then he must have gotten a shot, then the
3 sweat shirt coming back, Mark tells how he gets out,
4 he's very close to Mr. Calabrese. Over his shoulder he
5 sees what's in this statement, as he is looking over, he
6 looks over, he says, that he hands him the money, he was
7 standing inches from Bobby, he looks back towards Bobby,
8 he was still facing me, okay, and he began collapsing
9 towards me. When he first looked up he says he heard
10 him say something. I took his right hand, we were chest
11 to chest, he handed him the money. Seconds later Bobby
12 looked passed me. He said something. I have no idea
13 what he said, consistent with the medical examiner,
14 consistent with the detective, and consistent with the
15 last detective, regarding the dummy.

16 If I am Mr. Orlando, I am talking to Mr. Calabrese,
17 Herva Jeannot may be five feet from Mr. Calabrese, and
18 Mr. Jeannot takes a firearm. It's now within the
19 forty-eight inches that each of these witnesses
20 testified to, and everything Mark said. A shot is
21 fired. Now, I am Mr. Calabrese, here, there is no
22 question Bobby's looking in this way. Each one of the
23 officers, detectives said if I am facing him, there is
24 no entrance wound to the front of the head. There is no
25 question. We're not disputing that. We're not

Proceedings

1 disputing it's an entrance wound to the cheek. As I
2 said with each one of these witnesses, if I am facing
3 you, and Mr. Hayden's plays semantics with the evidence,
4 there's a shot that comes at me, I said to each of these
5 officers, I am standing facing here, I see, all of a
6 sudden this other person with a gun, it's raised, I go
7 like this with my right hand over like this to protect
8 myself, going to be what anybody does, he comes down,
9 the first shot's fired, coming from the outside of the
10 arm through the inside.

11 Remember the bullet wipe. The bullet wipe outside
12 of the sleeve is consistent with coming in, consistent
13 with what Mr. Orlando said, comes down into the back of
14 the ear without going through the sweat shirt, without
15 going through the head, because when the, remember, the
16 body's in here, two arrows, where's the third arrow.
17 So, obviously, couldn't put an arrow in because it
18 doesn't, it's not consistent with what they want you to
19 speculate that that is what it is. You heard from
20 Mark. Now, the body comes down forward. In Mark's
21 statement he says he goes to grab him as he leans
22 forward, as he's coming down, he tries to grab him, five
23 seconds, ten seconds. The whole thing lasted a couple
24 of seconds. We know Mr. Calabrese is 5'6", 157 pounds.
25 He is wearing a double X sweat shirt. He falls down to

Proceedings

1 the ground. Herva Jeannot comes over. Mark's still in
2 shock. Mark tells you, consistent with the medical
3 examiner's report, consistent with all the People's
4 witnesses, that Herva Jeannot comes over, shoots him
5 twice in cold blood. No question, horrific. Consistent
6 with the bullet wipe from the back of the sweat shirt as
7 you look at it, consistent with the sweat shirt being up
8 where his cheek comes down, face falling, hits the
9 ground, sweat shirt's coming down, coming up, top comes
10 down. Now the second shot to the head, the one you will
11 see the bullet wipe. Look at it. It will be lined up.
12 You're going to have three folds, goes to the back of
13 the head and remains in the head. The other one comes
14 through, when it comes through, only comes through once
15 inside of the sweat shirt.

16 So, you got this huge sweat shirt, falls to the
17 ground, consistent with what Mark says. Now you have
18 the second shot. Nothing inconsistent here. There's no
19 speculation that he is pulling on one side of the sweat
20 shirt, pulling on the other side, it's way up over his
21 head. Now he falls down, his body is there, first shot
22 killed him, whether his body's convulsing. Head's
23 inside. Second shot come down. That is how it comes
24 out. That is not inconsistent. That is a reasonable
25 doubt when you're back there.

Proceedings

1 Okay. Now we know how the shooting took place.
2 What happens now. Mark also tells you he's in shock.
3 He gets into his car. Herva's there. You say anything
4 your wife's dead. He goes, he stops for a second, that
5 is in statement, consistent with the video. The brake
6 lights you have now stopping. Mark says within two
7 minutes or three minutes, in his statement, I want you
8 to know that Herva is with me. Here's a guy who never
9 thinks for a minute will pull something like this. He
10 robs him and he's saying this isn't the first person and
11 not the last. Say anything, your wife's dead.

12 Now, Mark, what does he do. He's petrified,
13 fearful, what is he thinking? Now he starts calling Tom
14 Flores. Tom says Mark wasn't the same. Wasn't the
15 same. Now he wants everybody to see him with Herva.
16 So, the time comes, Herva says something, he can say
17 this is what happened. Consistent with of this. Now,
18 he calls them. He calls Suzuki Wantagh. Look at the
19 phone records. The phone records show that first call
20 is a minute and eight seconds long. He called Wantagh
21 Suzuki and asked for Ralph. Asked about a check. He's
22 now running all over the place calling everybody he can
23 call. Goes to the ATM so he can show that Herva was
24 with him. So whoever's going to believe that Herva's
25 with him.

Proceedings

1 Now he's petrified. He tells the police where the
2 gun is. They recovered that. Tells him everything.
3 Everything he tells him Cereghino is writing down, about
4 how he was so afraid, so afraid, that he had the shotgun
5 recovered in his house, as he was sleeping in the living
6 room in the house dozing off and on.

7 Again, the arguments I make here are for you to
8 consider. It certainly may be a situation where it's
9 long, I don't mean to be long winded and put anybody to
10 sleep. However it certainly needs to be addressed,
11 certain issues for you to consider. What happens next.
12 For that week, he distances himself. He doesn't drive
13 Herva, he is petrified, he's afraid. He says to the
14 detective, you don't understand. How do we get to this
15 third statement. How do we get here. He gets picked
16 up, cooperates fully, when he gets arrested he has no
17 weapons, no guns, no ammunition with him. They take him
18 to headquarters, remember the time line. He is over at
19 headquarters. Remember, they want you to speculate.
20 There's no DNA. There's no hair fibers, nothing
21 underneath the finger. The police said there was no
22 injuries to Mark at all. Again, for you to consider,
23 whether or not that is relevant. Consider whether or
24 not you should speculate. Again, whether he can prove
25 they aided and abetted. He gets picked up and goes back

Proceedings

1 to the precinct. He says that throughout the first I
2 think time line, remember he gets brought in about ten
3 o'clock.

4 As he is speaking with the first detective, McHugh,
5 he gives a statement. Told you at the outset that
6 statement is a lie. Doesn't want to be that first
7 person to tell the detectives so that Herva Jeannot can
8 either show his family Mark gave a statement that said
9 that he killed him, rather not say anything so my wife
10 and unborn child would not be hurt, would not be killed,
11 he saw him viciously kill somebody, threaten to kill
12 again. He is there two hours, two o'clock, gives that
13 statement. Then from two o'clock to five o'clock as you
14 remember not much is going on. Mark's in there. Then
15 five o'clock Detective McGinn comes in.

16 This is critical. What changes. What changes Mark
17 from lying to McHugh about not being present when
18 Calabrese is shot and killed. He starts saying, Mark,
19 tell me what happened. Tell me what happened. And Mark
20 Orlando sitting there saying, Detective McGinn, you
21 don't understand. You don't understand. We all now
22 understand because Herva threatened to kill his wife and
23 unborn child and then kill him. He didn't know he was
24 planning to rob Calabrese. He didn't know he was going
25 to shoot him. So, Mark tells the detective twenty-five

Proceedings

1 minutes, five o'clock to 5:25, you don't understand.
2 Tell. Is it the Mafia. Are you afraid they're going to
3 come after you. You don't understand. I can't tell
4 you. This isn't, I can't tell you, because I was there,
5 I was part of it. This is, I'm afraid. I saw what he
6 did, I had no idea what he was doing, that he was
7 planning to do that and now I am scared. I am afraid.
8 You don't understand.

9 Detective McGinn leaves and comes back in and says,
10 oh, Herva Jeannot, he's giving it up. Another forty
11 minutes, goes back and forth, back and forth, you don't
12 understand. I can't tell you. You don't understand.
13 Until McGinn tells Mark, he's giving it up. He admits
14 he shot him and he says you paid him. You know what,
15 you now have, also in evidence, hundred dollar bills
16 that were taken from my client's house during the search
17 warrant. Anything unique, numerically in any way.
18 Again, for the People to get up here and ask you to
19 speculate, oh, he paid him, Mark Orlando had the money,
20 this is no movie. Herva Jeannot took the opportunity,
21 knew Mark said he was going to pay him. Hey, Mark,
22 don't worry about it. Not your money. Then Mark says,
23 okay. Told you he killed him. Good. I can now protect
24 my family. We don't have to worry about any statements
25 that are shown to Herva Jeannot's family. I am the one

Proceedings

1 that said first he killed him. He tells Detective
2 Cereghino now what occurred. There's no more reason to
3 fear for his family.

4 So, now, you're left with all of the exhibits in
5 evidence, you're left hearing Mark tell you in his
6 statement to Cereghino what occurred and why he went to
7 all these places, why he kept the ATM receipt. Not to
8 set up an alibi, putting himself there, using his cell
9 phone, picking a place. Certainly very busy aiding and
10 abetting. He was driving away afterwards being afraid.
11 What should I do now. It's what occurred, what happened
12 before. Have they proven he was aware of what was
13 happening. That is what you need to consider. Whether
14 the People have proven that beyond a reasonable doubt,
15 that is what the aiding and abetting is. Not that Mr.
16 Calabrese was viciously shot and killed. He was. There
17 is no question about that. Just as horrific and
18 horrible as that is, it's just as horrific convicting an
19 innocent person. That is what you're selected here for,
20 to look at the evidence. And during voir dire I asked
21 you about those questions, these types of concerns we
22 had.

23 My job is just about over. I went through what I
24 wanted to discuss with you, maybe a little longer than I
25 thought, significant for you to consider all that. But

Proceedings

1 my job is just about done. When I sit down, I sit down
2 next to Mark and I am done. It's now for you to listen
3 to Mr. Hayden ask you to speculate how this and that
4 happened. And then to listen to the Judge's
5 instructions, and maybe tomorrow, a week from now, two
6 weeks from now you will have the time to discuss this
7 with family members and friends. Talk about all the
8 evidence in this case. Now is the time as jurors,
9 individually and collectively, to discuss and talk about
10 all this. Take a look at the exhibits. Take a look at
11 the locations and the businesses that are there and the
12 phone calls that are made, and the lack of a motive.
13 All of these things. We're confident, very nervous, but
14 very confident, if do you that, you will come back with
15 the only verdict in this case and that is that Mark
16 Orlando is not guilty.

17 Thank you.

18 Thank you, Your Honor.

19 THE COURT: As I instructed you, ladies and
20 gentlemen, we'll take a brief recess now. Same
21 admonitions. Don't discuss the case among yourselves or
22 with anybody else.

23 Everybody please remain seated in the gallery, and
24 we will bring you back in a few minutes and we will hear
25 Mr. Hayden's summation.

Proceedings

1 THE COURT OFFICER: Leave your note pads on
2 the chair and follow me out.

3 THE COURT: We will resume in approximately
4 five minutes.

5 THE COURT OFFICER: Ready for the jury, Your
6 Honor.

7 THE COURT: Everybody ready?

8 MR. HAYDEN: Yes.

9 MR. LEMKE: Yes.

10 THE COURT OFFICER: Jury entering.

11 THE COURT: Case on trial, indictment
12 167N-2005, People versus Mark Orlando.

13 People ready.

14 MR. HAYDEN: Ready, Your Honor.

15 THE COURT: Defense ready.

16 MR. LEMKE: Defendant ready.

17 THE CLERK: Let the record reflect the
18 presence of Mr. Orlando, the sworn jurors and the
19 alternates.

20 THE COURT: Everyone in the jury, can you see
21 the screen? Yes. Okay.

22 Mr. Hayden.

23 MR. HAYDEN: We're sorry, we owe all of you an
24 apology. We got it all wrong. Much more than that,
25 this poor defendant. He didn't do anything. He was

Proceedings

1 there. Doesn't mean he did anything. He just happened
2 to be there, just happenstance, when the other guy did
3 it. That is what happened. You know what he is. He is
4 a victim just like Bobby.

5 Can you imagine how terrified he must have been,
6 realizing, I'm next. You got to kill me. He killed
7 Bobby. Bobby didn't even know. Got to kill me. I can
8 tell the police everything. I can identify him. I was
9 right there. If I turn my back on him I'm dead. He
10 must have been so frightened, he have been frozen with
11 fear. He must have been so terrified he must have felt
12 like running for his life, as best he could, down to the
13 7-Elven only sixty feet or so away. He must have been
14 shouting bloody murder. That is human. I think that is
15 self-preservation. That is what is going on here.
16 Don't think he planned it. Forget the \$17,000. There
17 was no \$17,000 motive. Forget that.

18 You don't think Herva Jeannot needed an accomplice,
19 do you. Why would Jeannot need an accomplice. Why
20 would Herva Jeannot need someone to get him in and out
21 of that unfamiliar area. Why would Herva Jeannot need
22 someone to lure Bobby into that desolate corner of Long
23 Beach with the promise of a \$17,000 payment. Why would
24 Herva Jeannot need someone to distract Bobby. You know
25 Bobby's senses were going to be on high alert. He's

Proceedings

1 going to be making a \$17,000 collection. Very sensitive
2 to what is going on around him. It is a quiet, still,
3 relatively desolate corner of North Long Beach. Herva
4 didn't need an accomplice. Who cares if Bobby notices
5 Herva approaching. Why would Herva need an accomplice.
6 Why would Herva need someone to get up close to Bobby,
7 someone who could get a grip on Bobby, someone to get a
8 hold of him, someone to get that sweat shirt over his
9 head, immobilize him. Someone who could hold him
10 relatively still, make him a stationary target so Herva
11 could get in between him with that .44 caliber Magnum
12 and take a clean, accurate shot, which is what he did.

13 He didn't need an accomplice. Why would Herva need
14 an accomplice. Why would Herva need to get out of
15 there. Why would he need a wheelman. Why does he need
16 that getaway driver. He doesn't need that getaway
17 driver. It's so much more fun. You're going to love to
18 do an execution murder where you got no way out, and
19 stand there with a smoking gun in his hand with the
20 victim's dead body there and have nowhere to go,
21 because, remember, Herva couldn't count on the
22 defendant. He's just an eyewitness. He's just an
23 innocent bystander. Herva had no idea what the
24 defendant was going to do. The defendant would have
25 been just as unpredictable as Bobby himself. Herva

Proceedings

1 didn't need an accomplice. You know what he needed, he
2 needed an eyewitness. That is what he needed. He
3 needed someone who knew him well, someone who could
4 identify him to the police. Someone who could tell them
5 everything about that night or the following day or the
6 following week or the following month or the following
7 year. Herva would never have known when the defendant
8 was going to tell the police what had happened. But he
9 knows sooner or later it's going to happen. I guess
10 Herva enjoyed living on the edge. He likes taking
11 risks.

12 Now your common sense tells you that is not so.
13 That is not so reasonable. Your common sense tells you
14 that there's absolutely no way in this world that Herva
15 Jeannot would ever have executed Bobby Calabrese in
16 front of this defendant unless this defendant was right
17 in the middle of it, unless he could count on this
18 defendant to get him in and out of that unfamiliar
19 area. Unless he could count on this defendant to lure
20 Bobby into that roll in the first place. Unless he could
21 count on the defendant to distract Bobby. Bobby doesn't
22 know him. He could certainly count on the defendant to
23 get a grip on Bobby, to hold him and make sure he didn't
24 get away. To make sure there's relatively enough space
25 to get a clean, fatal shot in. Unless Herva was

Proceedings

1 absolutely certain he could count on this defendant to
2 be his getaway driver, which of course, is exactly what
3 the defendant did. That is your common sense talking.
4 All you had to do is listen and the whole thing will
5 come together.

6 How do you know the defendant planned it. Ask
7 yourselves, who is he. Let's consider who he is. He is
8 arrogant. The witnesses told you so. He is a big
9 spender. The witnesses told you so. Always liked
10 showing off expensive purchases. The witnesses told you
11 so. Always out there spending his winnings. Deeply in
12 debt. Multiple car payments, \$370,000 mortgage.
13 Payment on an in-ground swimming pool. Living beyond
14 his means. Multiple credit cards payments. Not the
15 kind of guy who should be a compulsive gambler.
16 Spending money to charter a bus to drive Barbara Diamant
17 and her friends all around Manhattan island, picking up
18 the tab at the restaurant, picking up the tab at the
19 nudey bars, the night clubs, showing off. I'm a
20 professional gambler. This Professional Credit thing,
21 I'm a professional gambler. I am a big man. Look at
22 this. Look at this wad. Check it out. Look at this
23 wad of cash. Look what I'm flashing around. Defense
24 counsel referred you to those gambling records.
25 Remember those gambling records. You know what they

Proceedings

1 are. They show you how compulsive he was. They show
2 you thirty-two consecutive days he placed bets 689 bets
3 over thirty-two consecutive days. Sundays, holidays,
4 Thanksgiving day, an average of twenty-one bets a day.
5 Thirty-two consecutive days. That is who he is.

6 Do you think he saved his winnings from Bobby? He
7 told everybody everything he spend his winnings from
8 Bobby on. This is a compulsive gambler. He's going to
9 keep winning. He's not going to lose. Why save
10 anything. The next ten thousand is right around the
11 corner. He is not saving anything. And then he starts
12 losing and he loses big. He is \$17,000 in the hole.
13 What's he going to do now. He doesn't have it. He can't
14 make the payment.

15 We know he is at least ten thousand short. How do
16 we know that. Because of what he told Tommy Flores.
17 Know what he told him. Remember that. Talked to Tommy
18 Flores about making those two sure fire bets. Can't
19 miss. This is your compulsive gambler talking. Sure
20 thing, two \$5,000 bets, make that \$10,000 right back.
21 Back in the game. Only problem, Bobby's not taking
22 those bets. Can't do it. Not going to take the bets.
23 The defendant needed another solution.

24 How do you know he paid Herva. Why else would
25 Herva do it, if not for \$500, those five Ben Frankins

Proceedings

1 hundred dollar bills in Herva's shoe box a week after
2 the execution murder. Just so happens the defendant has
3 ten of his own back in the shoe box. Of course he paid
4 him. He's not doing it as a favor. And they conspired
5 together. They're together. Sure, they had lunch with
6 other people at Professional Credit Services, but during
7 those breaks, they'd always be off by themselves. Never
8 did it before. They'd be talking in a corner
9 cavalierly in a corner of the hallway just talking.
10 Talking about what. How to get it done, that execution
11 murder. This is a step up for these two. The plan is
12 beautiful in its simplicity. Know what we're going to
13 do, what we're going to do is we're go to set up a
14 meeting with Bobby. We're going to kill him and tell
15 everybody, you cover me, I cover you,. I pay Bobby all
16 \$17,000, debt's gone, it's clean, no more, don't come to
17 me, I paid it. Then we tell everybody, great, he was
18 fine when we left. We met over by Industrial Place,
19 over by McCabe's, and then we all drove out. Bobby in
20 his car, he is fine, nobody's with him, and I'm in my
21 car. Herva's with me, and then I turn right, I head
22 over to Long Beach on my way to Wantagh Suzuki. Bobby
23 turns left going to Oceanside. It just so happens it
24 take him by the seen of the murder, and people are going
25 to believe that somebody must have waited there, maybe

Proceedings

1 another payment, maybe another collection, whoever
2 killed him, took the \$17,000. But I already paid him.
3 Then we go onto business as usual. We behave like
4 nothing's wrong. Like we didn't do anything. Go out to
5 Wantagh Suzuki, business as usual, to get the check.
6 Then I go over to a CitiBank branch, you know, got my
7 card, got my PIN number, instant alibi. Here I am.
8 It's 9:12 Friday night. You know where I was. I am
9 just making an ATM withdrawal. Think I just killed a
10 guy. Got to be kidding. Going out to see the
11 Borushiks. They know us both. Vivian works with us.
12 I'll hang out there. Behave like nothing's wrong.
13 Everything's just fine. Going to be beautiful. Then
14 after that, I take you home, when people come to us, I
15 cover you, I alibi you, you alibi me. Beautiful.

16 How do you know he planned it. Because he knew,
17 his father lived there twenty years, his wife grew up
18 there. He spent time there. Had friends there. Told
19 detectives Herva on the other hand knew nothing about
20 the area. Best we know he's never been there. No
21 evidence he was ever there. Can't commit an execution
22 murder in an area you know nothing about. Don't know
23 the major thoroughfares, don't your way in, your way
24 out. Tough area down there. A lot of different towns
25 converge, ocean inlets, bridges, tough getting around

Proceedings

1 there.

2 How do you know the defendant set it up. You got
3 that videotape. That's the most inadequate videotape.
4 You're disappointed. I understand. You see, that is
5 the thing. Wow, we're going to see the scene of the
6 murder goes by. And then you come up with nothing. But
7 it's not entirely nothing. What you see is you see the
8 defendant driving Herva around, showing him everything,
9 setting it up. Selecting just the right area, quiet,
10 dark enough. Once you realize we're on daylight savings
11 time on the video, when in reality it should have been
12 on standard 9:18 should be 8L18, 8:18.51, we have the
13 view from the east camera and we're looking out over
14 Broadway. Here comes the Suzuki, 8:18.51. You can see
15 the defendant's large head behind the steering wheel.
16 He is driving along and then he proceeds northbound and
17 he's picked up by the northeast camera. You will see
18 something very interesting the detective picked up.
19 There's like an obstruction along the back of the
20 plate. What is that. What is going on with that. Very
21 hard to make it out on the video. It's just like a
22 shadow. The defendant goes by and eventually the seen
23 of the murder. Check it out. Moves on.

24 Now the next frame of interest comes at 8:19.
25 Defendant has looped around. He likes this area. Now

Proceedings

1 we're going to make certain. Now the northeast camera
2 picks up the defendant's headlights coming south and you
3 see the defendant make a U-turn and pull up right by the
4 seen of the murder. He likes what he sees. A couple of
5 boat yards, boarded of building, dark, no activity.
6 Looking good. Defendant pulls away. Does another
7 loop. While he is looping around to come back, the
8 phone records show 8:23 he calls Bobby and obviously
9 tells Bobby this is where we're going to meet. Come
10 meet me here, south of the 7-Eleven. Meet me there.
11 Then we're at 8:25, and at 8:25 we have more interesting
12 frames. You see once again the defendant coming towards
13 the northeast camera. You see the defendant's
14 headlights coming toward the northeast camera. You see
15 the defendant make a loop, make that U-turn, come
16 around, park and stop. The lights are on. And then the
17 lights are off. Why are the lights off. Why turn the
18 lights off. That is when Herva gets out and takes a
19 position along side the car. Ducks down, no one
20 notices. The lights come back on and we're waiting.
21 We're all waiting for Bobby. And then, 8:34.58, east
22 camera picks up Bobby. Picks up the Infiniti going by,
23 going northbound. Then the northeast camera picks up
24 the Infiniti's distinctive rear portion, and you see
25 Bobby pull in towards the defendant, pulling in front of

Proceedings

1 the defendant, 8:35.05, and basically loses any coherent
2 frames until it picks it up at 8:35.53 when we see the
3 defendant moving out around Bobby's body. And then at
4 8:36.52 we have Brian Atkinson coming by. That is the
5 next car coming by and you first see him going passed
6 the east camera, then you pick up, goes passed the
7 northeast cameras, you see his headlights by Bobby's
8 dead body laying on the cold hard surface of the road.
9 It's then about 8:39 and you have Mrs. Cardineau coming
10 by in the black car. You see as she moves passed the
11 east camera into the northeast camera her headlights
12 pick up Bobby's dead body.

13 Let's get back to that license plate. Interesting
14 piece of evidence for Columbo fans. What is going on
15 there. It's not on there. When the Suzuki Verona is
16 eventually taken into police headquarters, it's not
17 there. What is that obstruction. What is that shadow
18 that goes down? I submit to you it's a strip of tape.
19 If anybody hears the gunshots and they see the car they
20 can't take a plate number down because the plate's
21 obstructed. Away you go. The police stop you, I don't
22 know, maybe some kids put it there. I don't know. Take
23 it off, officer, gee, I'm not sure how it wound up
24 there. Once we get far enough away from the murder you
25 take it off yourself. It's done.

Proceedings

1 And there's another question. Why are we trying so
2 hard to get to a secluded that area because it is really
3 secluded once you get south of 7-Eleven. It's dark.
4 Why. The defendant talks about looking for the discreet
5 end. That is what the video is going to show. He has
6 not said we're looking for a discreet area, we're up on
7 Industrial, but we saw people up there, saw a truck up
8 there, it's no good. Why.

9 During counsel's opening statement counsel said
10 well, they always would meet in a discreet area. That
11 is not so. They never did. They were always meeting at
12 times in broad daylight, in a public parking lot.
13 Public parking lot for Profession Credit Services.
14 Bobby parked by the front, they would sit and wait about
15 a hundred feet from the front door. They waited for the
16 defendant to come out. When the defendant came out,
17 Bobby would get out of the Infiniti and walk over to the
18 defendant, there'd be the hug, and then the passage of
19 the envelope with the bills. That would be it.
20 Nobody's looking to avoid people. People were coming
21 out of the front door the whole time. People are
22 hanging around the parking lot. People would be going
23 to their cars. So, they never saw a secluded area
24 before.

25 Why did they look for such a secluded area that

Proceedings

1 night? Because they were going to kill him. Because
2 they were going to execute him. That was what was
3 different that night. That is why they were looking for
4 a secluded area. And the defendant tried to explain it
5 away to the police. He told the police, well, you see
6 what happened was, we met in North Long Beach that night
7 because I was going to pick up this check from Wantagh
8 Suzuki. So, I told Bobby, gee, it makes sense now for
9 us to meet in North Long Beach if I'm picking up the
10 check from Wantagh Suzuki. If Bobby's willing to go all
11 the way out to Farmingdale, to Professional Credit
12 Services, to pay the defendant, he would have met the
13 defendant anywhere to collect \$17,000. And Wantagh
14 would have been the halfway point. Halfway between
15 Professional Credit Services and Bobby. They could have
16 met in the Wantagh Suzuki parking lot. Hey could have
17 met in the CitiBank parking lot. They could have met
18 anywhere they choose. The defendant selected this
19 discreet desolate secluded area because the whole idea
20 wasn't paying off \$17,000, it wasn't. There was no
21 \$17,000. The whole idea was executing Bobby and
22 eliminating that debt.

23 How do you know the defendant planned the whole
24 thing. Have to use your common sense, your good
25 judgment, your experience and your intelligence. That

Proceedings

1 is why you're here. The defendant wants you to believe
2 he is just an innocent bystander. Doesn't mean he wants
3 you to believe that. He wants you to believe that he's
4 gone to pay Bobby \$17,000. Once you believe that, you
5 know, at a certain point it's good night, he's going to
6 clear the deck, gets that debt off his shoulders. Going
7 to get that load off his mind. He is going to go out
8 there and that is what he is going to do. That is what
9 he wants you to believe, and he is with his best
10 friend. He is with Herva. Always hanging out together,
11 at work, after work, nudey bars. These guys are tight.
12 He is going to make Bobby, he likes Bobby, had a good
13 relation with Bobby. Bobby always paid when he won.
14 They always hugged. This is a good knew. And he pays
15 Bobby, the debt's covered, what a relief. And he hugs
16 Bobby and the next thing he knows he hears the roar of
17 the gunshot from behind his right ear and Bobby goes
18 down. Then he realizes it's Herva. And Herva goes over
19 to the car and shuts the Infiniti door, comes back, and
20 leans over and fires two bullets into Bobby's head while
21 the defendant is standing there watching.

22 How do you use your common sense. Well, ask
23 yourselves, what would an innocent bystander in that
24 situation have done. How would an innocent bystander
25 have reacted to that situation. Your common sense tells.

Proceedings

1 you that an innocent bystander would have been in
2 shock. I am not talking about gee, Yankees lose to the
3 Royals again shock. I'm talking about clinical shock.
4 I'm talking about, I can't take my next breath shot.
5 I'm talking about, I can't compose a coherent thought
6 shock. I'm talking about I can't articulate a sentence
7 thought shock. I'm talking about my life has been
8 shattered and will never be the same shock. I'm talking
9 about my world has been turned upside down shock. I'm
10 talking about, I'm devastated shock, I will never get
11 over this. I'm talking about, I have been thrust into a
12 nightmare role which I'll never escape. Okay. That is
13 what your common sense tells you an innocent bystander
14 would have done. That is how he would have reacted to
15 something like that.

16 How about our defendant. What did he do. He's
17 just seen Herva gun down Bobby. He's just watched Bobby
18 die, I mean just watched him die. Herva says let's go
19 and what does he do? He climbs into the Verona. Herva
20 climbs into the passenger's seat along side of him. The
21 defendant starts to drive around Bobby's dying body.
22 The defendant tells Herva he notices his feet was still
23 moving, there was a little life left in him, reflex
24 reaction anyway. So I stopped.

25 Now, defense counsel tries to read into some

Proceedings

1 testimony, tries to say Herva was threatening him. I'm
2 going to kill you and your wife and your unborn child,
3 but that comes from nowhere. That is not what the
4 defendant said. Defendant's making up a story. It's
5 stuff for him. He didn't mention anything like that.
6 He just says, I noticed his feet were moving so I
7 stopped. Herva got out, Herva went over to the body and
8 tried to shoot him a couple more times, but the gun
9 wouldn't go off. So, Herva got back in. I drove him
10 away.

11 Is that the behavior of an innocent bystander in
12 shock over what he's just seen? Is that behavior of a
13 man who unexpected watch Bobby die, out of the blue,
14 some big surprise, out of nowhere. No. That is the guy
15 who planned it. Wasn't upset by watching Bobby die.
16 That was what was supposed to happen. That is what he
17 paid Herva to do, to do his dirty work for him.
18 Couldn't do it himself. He is not upset. He is happy.
19 The debt disappeared before his eyes. Right on.
20 Now what. Now, we're driving, getting off of Austin
21 Boulevard, cutting behind the 7-Eleven, heading south,
22 going towards Long Beach, heading towards Wantagh Suzuki
23 now. It's about three minutes after this execution
24 murdered. It's three minutes after he stood and watched
25 Bobby die. Now what. He gets on his cell phone. He is

Proceedings

1 not complaining. He is using the cell phone calling
2 whoever he wants, he's calling Wantagh Suzuki, gets
3 Frank Walker, I want Ralph. I want the owner. I'm
4 coming to pick up a refund check. I want Ralph. Put
5 him on the phone. Okay. Frank Walker comes back, he's
6 not here, he's gone. We're closed up for the night.
7 So, I don't see the check. Don't come out, going to
8 have to get it tomorrow. The defendant's tone of voice
9 is like normal, abrupt, arrogant, the way he always was.
10 Not upset, very composed. Very calm.

11 Is that the behavior of an innocent bystander who
12 just watched a young man die. Is that a man in clinical
13 shock. Is that a man whose life has been shattered
14 forever. Of course not. That's the guy who planned
15 it. That's the guy who set it up. That is the guy who
16 wanted it to happen. That is the guy who was ready to
17 alibi Herva, and he's expecting Herva to alibi him.
18 That is a man so cold and hard and so calculating he's
19 methodically piecing together this after-the-fact
20 alibi.

21 Where do we go now. We're on the road driving
22 along like a getaway driver. Now we go over the Loop
23 Parkway and we're going over a bridge, and Herva tosses
24 away the ammunition. Tosses away the shell casing.
25 Everything's now gone. Guns unloaded. We continue on.

Proceedings

1 We go onto the Wantagh Parkway. We hit the Sloop
2 Channel Bridge, get up on the crest and the defendant
3 stops. Herva gets out the front passenger's door.
4 Herva goes to the edge of the bridge. Herva takes
5 the .44 magazine revolver, tosses it, into forty feet of
6 water and the revolver sits down below forty feet of
7 water.

8 Now Herva's outside. Is the defendant saying he
9 can't hurt me now, I got to get out of here, he's going
10 to kill me too. Got to kill me. Can't let me live.
11 I'm out of here. I don't care about the passenger's
12 door. I don't care if it blows off. I'm out of here.
13 No, no. What the defendant, the getaway driver do.
14 Waits. Herva comes back, climbs into the front
15 passenger seat and away they go. And then it's out to
16 Wantagh Suzuki. But what a shame. They were closed.
17 No one was their to see him and Herva. That part of the
18 alibi didn't come together.

19 Now, we got CitiBank. Can't lose at CitiBank.
20 What do you do at CitiBank? You take your card, got
21 your PIN number, you make a transaction, and bingo, 9:12
22 Friday night. I'm at CitiBank. Me having anything to
23 do with the execution murder, I'm doing an ATM
24 withdrawal. What are you crazy. I had nothing do with
25 that. Then it's onto Plainview. Now we get further

Proceedings

1 away from the scene of the murder to see the Borushiks.
2 Cell calls 9:14, 9:18, 9:19.18, sets it up. We're
3 coming over. Forget it's late on a Friday night.
4 Forget it's early December. Perfect time to look at the
5 deck around the pool. Forget the fact we're intruding
6 on the Borushiks lives, we're coming in. Here we come,
7 Herva and me. Now it's 9:26. Now he's calling Tommy
8 Flores, calling Tommy to talk about the defendant's
9 efforts to retrieve the refund check. Why would Tommy
10 Flores care about that. What difference does it make.
11 Who cares. Can you think of a more boring topic. Got
12 to make a call. Why. Because no one saw him at Wantagh
13 Suzuki. Got the call in to Frank Walker. Frank Walker
14 confirming to the police he called, he called me like
15 9:39, and told me that he was going out to Wantagh
16 Suzuki to pick up the refund check. No one at the
17 Wantagh Suzuki to confirm this. Now he calls Tommy
18 Flores, and told Tommy he went to Wantagh Suzuki and I
19 couldn't get in because it was closed. Of course the
20 defendant sounded strange during that conversation.

21 Now we're pulling up outside Borushiks house and
22 the defendant gets out of the car and Herva stays in the
23 car. The defendant walks into the Borushiks home and
24 starts talking with them. Everything is fine. And you
25 have proof beyond any reasonable doubt that the

Proceedings

1 defendant was right in the middle of it. Why. Do you
2 think if the defendant were really an innocent
3 bystander, an eyewitness, who had just seen Herva
4 execute Bobby out on the street, that Herva would have
5 let the defendant go into the Borushik's house on his
6 own where he could have begged the Borushiks to shut the
7 door, lock the door. You know Herva killed this guy.
8 He is outside in the car. He is going to kill me.
9 Going to call the cops. Give me the phone. I'll call
10 them. Herva doesn't mind the defendant going in and
11 speaking with the Borushiks. He wants the defendant, he
12 has no ideas they're part of the alibi. Eventually
13 Herva himself goes in and they talk, it's fine, it's
14 normal. They talk about the pool. She vacuums the
15 guy's feet. It's business as usual. Execution murder.
16 Guy was composed. He was fine. Just talking about the
17 pool.

18 Now we move on. Now what does the defendant do.
19 The defendant drive Herva home. Think about that.
20 Once again you have proof beyond any reasonable doubt
21 that the two of them were right in the middle of this
22 together. Why. If the defendant is an innocent
23 bystander, who now realizes that Herva is a cold blooded
24 killer, you think the defendant's going to drive him
25 home where his wife is, where his mother-in-law is. You

Proceedings

1 got to be kidding me. I thought he was so afraid of
2 what was going to happen to his familiar, he's driving
3 him home. Think about that. That alone establishes his
4 guilt beyond a reasonable doubt. When he gets him home,
5 he takes him up to his room. He has a story about that
6 for the police. He says, he took him up to his room.
7 Thought his family might confirm that happened. So, I
8 took him up to my room. I gave him some porno tapes.
9 He paid him. That is when he paid him. That is why he
10 brought him room there. That is where the money passed
11 hand. We don't know how much, but it was at least five
12 hundred, far less than the \$17,000. That was what is
13 going on up there. And then he drove Herva to Herva's
14 place. And now everything is fine. The ammunition is
15 long gone. The gun is sitting below forty feet of
16 water. Herva Jeannot is unarmed. Herva is now at home
17 inside the, you know, that daze of BB gun. That is
18 where he is. That is where Herva is now. Of course,
19 what is the defendant going to do. He is free of
20 Herva. He is running to the police station, help me.
21 This guy just killed Bobby Calabrese. I am telling you
22 to help me. He is on the cell phone right then. Can't
23 hurt him now. Please, officer, you got to do something
24 for me. No, it's business as usual. But not away.
25 Because we're pretending, remember, we're pretending we

Proceedings

1 don't know anything about what happened with Bobby.
2 Bobby was killed. My God, Bobby's dead. Oh, no. You
3 got to wait for somebody to come to you. Can't let on
4 you know anything. So Tommy Flores calls. Tommy Flores
5 had a very human reaction to Bobby's death. His life
6 was shattered. You saw him up on that witness stand.
7 You saw he will never forget Bobby's death because it
8 hits that human level. It meant something to him. Not
9 like this defendant who wasn't upset in the slightest.
10 Conducted business as usual. Remained composed the
11 entire time. When Tommy calls, hey, the defendant,
12 Tommy, Bobby's dead, oh man. You know, they might blame
13 me. Then did you meet him. Because the defendant
14 didn't say anything about it at the time. Did you meet
15 him. Did he see him. Yeah, I saw him. I paid him the
16 whole seventeen. Met by McCabe's on Industrial Place,
17 and everything was fine. When I left him he's driving
18 towards Oceanside. He is alone, alive and well. I
19 think people might blame me. I am nervous, you know,
20 you know. What I want to do, I want to speak to Bobby's
21 family. I want them to know I am cooperating. I paid
22 him. You want arrogance. You want a cold, hard
23 calculating person. He wants to sit down with Bobby's
24 family. He wants to look them in the eyes. He wants to
25 tell them, your son, brother, was fine. I was with

Proceedings

1 him. I'm cooperating. He was just fine. I paid him.

2 You have to look hard to try to come up with
3 coldness like that. This isn't a innocent bystander.
4 That is a cold blooded killer.

5 Let's talk about when Barbara called Barbara
6 called. She was upset. Tommy was destroyed. I can't
7 get anything out of him. I know you met him. I want to
8 talk to you about it. Can you tell me anything about
9 what happened. Defendant's so arrogant, couldn't help
10 himself, couldn't help himself. He had to show off. He
11 had to show off what he knew. Yeah, he was shot three
12 times in the back of the head. Guess what. The police
13 didn't know that. The autopsy had not been completed.
14 Hadn't begun when that conversation took place, when the
15 defendants told her he was shot three times in the back
16 of the head. He identified himself as one of the
17 killers. Then the waiting game continued. The police
18 are coming, sooner or later they're getting here. He's
19 got to be ready for them. Herva and I are going to
20 alibi each other. It's going to be fine. Hold it
21 together. Stay calm, composed. Stay cool.

22 Defense counseling during opening statement said
23 that you're going to learn that he didn't go to the
24 police for a week after the execution murder. He never
25 went to the police. They brought him in. Works for

Proceedings

1 Professional Credit Services making telephone calls to
2 people in debt. He persuaded people to pay debts who
3 don't want to pay. He convinces people it's in their
4 best interest to pay debts. He figures he can convince
5 anybody of anything including these police officers.
6 So, he sits down. This is fine. He's not upset.
7 Bobby's dead. Set the whole thing up. And he's
8 actually enthusiastic. Forget entirely the man is
9 buoyant talking about gambling. Got McHugh asking, what
10 are you talking about, sure you bet professional
11 basketball in the final score. What is wrong with you.
12 You bet the quarters, you bet the half, you don't bet
13 that final score. He is going on and the story's
14 spinning out. It's beautiful. I was with Herva. I
15 paid him, Herva will tell you. I paid him all \$17,000,
16 hugged him, both drove out to Austin Boulevard. I went
17 right, he went left going towards Oceanside. That is
18 the last I know, officer. And, he signs the written
19 statement. Figures, okay, when do I go home? He sits
20 and waits. Waits and waits.

21 Hours go by. Here comes Detective McGinn. Not
22 only the problem here is that they're not buying it,
23 they got a video. Look, we know you didn't meet him
24 where you say you met him. We know you met him at the
25 scene of the murder, you and Herva were there. We know

Proceedings

1 that. Tell me the truth. What are you talking about.
2 Got the phone records. We know what you're saying is
3 not so. Talk to me. You wouldn't understand. You
4 wouldn't understand. Detective, you wouldn't
5 understand. Make me understand. Talk to me. Tell me
6 the truth. I'll understand. Tell me the truth. Talk
7 to me.

8 Defense counsel paints a very simply picture. You
9 don't understand because he's a afraid. He's afraid of
10 Herva. That guy brought home after the execution. He's
11 afraid of that guy. Doesn't want to talk. We have a
12 different take on what he's doing. What's that all
13 about. He's buying time. He said he needs another
14 story. Got no fall back position. He's got to say
15 something. Don't know what to say. Got to find out
16 what they know, how am I going to tell this story in a
17 way they're going to believe. So, you don't
18 understand.

19 Detective says he was calm throughout, never
20 upset. He was fine. Just give him time. He's is got
21 to think it through. Detective McGinn leaves, comes
22 back a little later, you wouldn't understand, I'm
23 afraid. I'm afraid. What are you afraid of. Talk to
24 me. We will protect you. You wouldn't understand. I'm
25 afraid. And Detective McGinn finally says, look,

Proceedings

1 Herva's giving it up. Herva's telling us everything.
2 So, come on. He's telling us he did the shooting and
3 you paid him. And the defendant realizes the time is
4 now. I don't care what story I had together at all. I
5 am telling the story and he latches into it and he can't
6 get it straight. Defense counsel manages to gloss over
7 the first version of the second story. Let's not gloss
8 over the first version of the second story. Remember
9 that one. He had no time to work it out, it's time to
10 think it through. , so he gets rolling and his big pitch
11 is I knew nothing about it. That is all he is thinking
12 about. Not thinking about the detail, not thinking
13 about the ramifications of what he's saying. It's, I
14 knew nothing about it.

15 So, he said I'm standing there with Bobby, paying
16 Bobby, I hold Bobby and the next thing I know, there's
17 this gun shot by my right ear. Nothing about seeing
18 Herva, not the first time around. He's just working
19 out XXX of his head here and Bobby goes down. I'm
20 faced, we're face to face, and he goes down on the
21 road. And then after he goes down, I see Herva moving
22 on to Bobby's car, shutting the driver's door, comes
23 back and puts two more bullets in Bobby's head. Herva
24 says, let's go. I'm driving Herva around Bobby body. I
25 see the feet moving. I stop. Herva gets out, Herva

Proceedings

1 leans down and try to shut him again but the gun doesn't
2 work. About to get back in the car and Herva leans down
3 and take the \$17,000.

4 Now, what went wrong with that story. There is no
5 \$17,000. So, when the defendant is running through the
6 story he doesn't mention it because it's not there. It
7 doesn't exist. He's spinning his wheels as best he
8 could. It's not working. There is no \$17,000. But as
9 he's telling the story, the detective realizes, oh, my
10 God, what's Herva's motive. Why is Herva doing this.
11 Sure, I'm telling him I had nothing to with it. Why is
12 Herva doing it. Then he leave the \$17,000 in the story
13 but this comes out like an afterthought. Like they're
14 about to take off and Herva reaches down and grabs the
15 \$17,000. If that was Herva's motive that would have
16 been the first thing he'd do. Hold the gun, give me the
17 \$17,000, then kill or shoot him, watch him go down,
18 reach down, then take the \$17,000. Or he would have put
19 all three bullets into Bobby, then taken the \$17,000.
20 He certainly wouldn't have waited until the defendant
21 stopped unexpectedly because Bobby's feet were moving,
22 then get the \$17,000. He couldn't keep the story
23 straight.

24 Now, they asked him, you want to talk to an
25 Assistant District Attorney. Do you want to speak with

Proceedings

1 an Assistant District Attorney. Do you want to go on
2 videotape. That videotape would be available for
3 courtroom presentation. The defendant refuses. The
4 defendant refuses because you can't control the
5 videotape. What's on it is what's on it. But I will
6 give a second written statement. You can control that.
7 You don't have to sign it unless you're satisfied. You
8 can make corrections. You can make additions, you can
9 run the show. Then he goes into the second version of
10 the second story, the more embellished version. Add
11 more facts, develop it, but it still comes out in a calm
12 way. Once again, he runs through the story with
13 Detective Cereghino, but he doesn't think of the
14 \$17,000. Why, because there's no \$17,000, and this time
15 he's way down the road. Detective Cereghino wanted a
16 motive. He then noticed that Herva has the money. He
17 must have picked it up. He doesn't mention it because
18 it wasn't there. Here's another interesting thing for
19 you. Kind of hard to hide this fellow. You can't carry
20 this gun in your pocket, you can't carry this gun in
21 your waistband. If you did, you couldn't walk. Why
22 doesn't the defendant notice the gun? He can't tell the
23 detective he saw the gun. He has to tell the story in
24 such a way that he never saw the gun. Now, he remembers
25 to put together the first part of that, I didn't see the

Proceedings

1 gun story, but not the second part. What he tell us the
2 detective is, I'm with Tommy at work. My trunk is
3 locked. Herva comes over. Herva asks if he could have
4 my keys. He wants to open the trunk. I watch him go
5 over to the trunk and opened up the truck. He put a bag
6 in there. Well, it must have been a pretty big bag
7 carrying that gun. And he shuts the trunk and we're
8 suppose to believe that must have been the gun. The
9 only problem is, when he is telling the story to
10 Detective McGinn, and he is telling the story to
11 Detective Cereghino, the gun disappears. Where did it
12 go. It never comes out. Remember, he couldn't have
13 seen it, so he can't admit Herva's carrying it the
14 entire time. Where did to come from. If it's in the
15 trunk, when did Herva get it. The defendant is sitting
16 in the driver's side, engine's running, the key's in the
17 ignition, Herva gets out to take a piss. Now Herva's
18 gone. Well, when did he get the gun, if the gun is in
19 the trunk. I mean, surely, the defendant would have
20 noticed Herva come back to the trunk. Surely he would
21 have noticed Herva open the trunk. How is Herva going
22 to open the trunk. Doesn't have the keys are in the
23 ignition. A oh. Surely he would have noticed that the
24 light on the dashboard when he went to the trunk. He
25 doesn't mention Herva getting the gun from the trunk,

Proceedings

1 because Herva didn't get the trunk from the gun. Herva
2 had the gun the entire time inside the car.

3 The defendant had a real problem with this
4 statement. These statements, you know, what is the real
5 problem. If he really noticed a bystander, why in God's
6 name is he putting together that alibi. Oh, boy. How
7 am I going to explain that away. How am I going to
8 cover that up.

9 Well, he's a smart guy. Comes up with a halfway
10 decent story. He says, the reason I kept running around
11 was because he wanted to be seen with him, because
12 people would know I met Bobby, I want them to know Herva
13 was there too so they would know, when I told them that
14 Herva did it, they'd be able to check with people and
15 realize, yes, I had been with Herva. That is why I ran
16 around with Herva trying to be seen by as many people as
17 possible. The only problem with that story is if that
18 were so, the first thing the defendant would have done
19 once he was rid of Herva is tell the police look, Herva
20 did it, I want you to know that. I need protection from
21 him. If you want to confirm that Herva was with me, all
22 you have to do is talk to these people, they'll tell
23 you. The defendant doesn't do that. He is not trying
24 to get him arrested. He is alibiing Herva. He is
25 protecting Herva. He's got another problem too. While

Proceedings

1 telling these two versions of the second story he wants
2 to divorce himself from Herva and Bobby. He wants to
3 step back. He wants to stand clear of this like he had
4 nothing to do with it. Well, it's a hard story to
5 tell. You can't tell detectives that he saw Herva
6 coming up behind Bobby with the gun in his hand because
7 why wouldn't the defendant have warned Bobby. Why
8 wouldn't the defendant have run off himself not knowing
9 what Herva was going to do with the gun. Why wouldn't
10 the defendant have told the story that way. And he
11 can't tell detectives what really happened because what
12 really happened is, he got to Bobby and with that hug he
13 yanked Bobby's sweat shirt over his head and pulled him
14 sharp to the left. Can't tell that story. That puts
15 him in the middle of it. So, he tells the story two
16 different ways trying to divorce himself from what is
17 going on. The first story, of course, is I am just
18 standing there. I paid Bobby. I hugged Bobby and gun
19 shot goes off behind my right ear. Of course the
20 shooter would have to have been facing Bobby because the
21 defendant is facing Bobby and the shooter is behind
22 him. That is the first story. Then the second story
23 comes around and the second story is, this is the more
24 embellished version, this is I am standing facing Bobby
25 and Bobby's facial expression changed. I didn't catch

Proceedings

1 what Bobby said, I looked around and there's Herva.
2 Herva's extending his hands towards Bobby, facing Bobby,
3 and the gun goes off. And I look at Bobby, and Bobby's
4 still facing me, still face to face. Defense counsel
5 left that out when talking about the second statement to
6 the Detective Cereghino. He looked at it. You see
7 that. So, we're facing one another and Bobby goes
8 down. That would mean if you disregard defense
9 counsel's testimony, and if you concerned yourself with
10 what the defendant told the detectives, that Herva and
11 Bobby would have been facing one another, in both
12 versions of the second story and you know that can't be
13 so. Because you know all three bullets tore into
14 Bobby's head from behind. Contradicts what the
15 defendant was stating and you realize that each time the
16 defendant spoke with detectives, he was trying to
17 deceive them and that effort to deceive them alone
18 establish his guilt beyond any reasonable doubt.

19 How could you be certain the defendant did more
20 than just plan this whole thing. How can you be certain
21 that the defendant did more than just set up Bobby. You
22 can be certain of that, first of all, because who Bobby
23 was. Bobby was tough. So tough he was not going down
24 without a fight. Bobby was a wrestler. He wasn't just
25 a good wrestler, he was a state champion out of

Proceedings

1 Kellenberg High School. He realized, of course, that
2 Bobby would have been more than able to get away, to
3 save his life, given half a chance. You realize that
4 Bobby would have been more than able to resist, to fight
5 back, to save his life, given half a chance. You
6 realize, of course, he wasn't given half a chance. You
7 realize, of course, one man couldn't have executed Bobby
8 that way. You realize it had to be two men. Had to
9 have been Herva who fired the fatal shots and you had to
10 have the defendant. It was his \$17,000. He was able to
11 lure Bobby to that desolate corner of North Long Beach.
12 He was able to get Herva in and out. Herva was the
13 dependent on him. That area was unfamiliar to Herva.
14 You had to have the defendant to distract Bobby. So,
15 Bobby wouldn't have noticed Herva approaching, despite
16 the fact his senses were on high alert under those
17 circumstances. Had to have the defendant to serve as
18 the wheelman. Somebody had to get Herva out of there.

19 How do you know the defendant still did more. You
20 know that because of the sweat shirt. The sweat shirt
21 speaks volumes to you. First of all, you know that that
22 sweat shirt was torn, ripped in very significant ways.
23 Four inches down the neck. Bobby cared about himself.
24 His photograph shows you that. Bobby told you that
25 sweat shirt was in excellent condition when Bobby left

Proceedings

1 him that night. Like new. Well, something yanked that
2 sweat shirt down the middle and tore it, indicative of a
3 violent struggle, and the pocket was yanked, ripped and
4 torn as well, indicative of a violent struggle. And
5 then, of course, the sweat shirt wound up over Bobby's
6 head. The neck was over the top of Bobby head. How do
7 you know that. I know that because Officer Vozzo told
8 you. Officer Vozzo was the first officer on the scene.
9 He found Bobby. He found Bobby down on the cold hard
10 surface of the road. Dead. The neck of the sweat shirt
11 over the top of his head and bullet holes to the back of
12 the sweat shirt aligning with bullet wounds to the left
13 side of the back of Bobby's head. That is where Dan
14 Brooks found Bobby's body, the first paramedic on the
15 scene. He had to cut away Bobby's sweat shirt just to
16 get to the back of his head.

17 How do you know. This is Bobby's tank top,
18 undershirt. Even though the neck area was torn, the
19 undershirt was not pulled up over Bobby's head. So, you
20 have virtually no blood along the front of the
21 undershirt. There's spots of blood, there's smears of
22 blood, but really relatively little. It's mostly up
23 around the neck area. The sweat shirt, on the other
24 hand, is soaked with blood. Why. Because it was pulled
25 up over Bobby's head as Bobby laid dying, blood from the

Proceedings

1 egregious wound to his right cheek, bled and soaked the
2 front of his sweat shirt. How do you know. How do you
3 know the sweat shirt was up over Bobby's face as he laid
4 on the cold hard surface of the road. Because one of
5 those bullets that was fired, his face, his right cheek,
6 leaving this wound, and then came out through his sweat
7 shirt leaving this hole, this explosive holes that
8 virtually matches the wound to Bobby's cheek. Here you
9 get a better idea of the positions of the wound, of the
10 hole in the sweat shirt, the sweat shirt is up over
11 Bobby's head to the point where the hole fits right over
12 the wound.

13 How do you know there is may violent struggle going
14 on here. There's a hole to Bobby's sweat shirt. It's
15 on the right sleeve. It's low down on the right sleeve
16 just over the cuff. This is the wound. The wound is
17 much higher up on the forearm, right by Bobby's elbow.
18 This gives you a better idea of the relative positions.
19 Here's the hole down by the bottom of the sleeve, just
20 beyond the cuff. Here's the wound to Bobby's forearm,
21 up by the top, up by the elbow. What does that tell
22 you. That tells you there is a violent struggle going
23 on before first shot's ever fired. During the course of
24 that violent struggle, somebody yanks Bobby's right
25 sleeve back. Because, you know, Bobby's not wearing it

Proceedings

1 up by his elbow, not that night. It's cold, it's windy,
2 you're on the ocean. There's water all around you.
3 That is Bobby's only source of warmth. He's got the
4 tank undershirt underneath. So, of course, Bobby
5 wouldn't yank his sleeve up. We all know that this is
6 the first shot. The shot's through the forearm that
7 goes into the back of Bobby's head behind his right
8 ear. So, you know somebody yanked that sweat shirt up
9 over Bobby's head. Who did it. Wasn't Bobby. Cold
10 night. He's not yanking that sweat shirt above his
11 head. Certainly not under attack by Herva Jeannot.
12 Herva Jeannot didn't do it. Herva Jeannot's hands are
13 occupied. He is holding the gun like this. It's
14 heavy. When you're in the jury room ask for this. Try
15 to hold this. It's heavy. Jim DiBeneditto told you
16 there's a tremendous kick in that gun. A tremendous
17 recoil. Herva had some service experience. That is how
18 you hold that gun if you want an accurate shot to get
19 off an accurate shot, and Herva got off a heck of an
20 accurate shot, all three shots right to the head.

21 Herva didn't have free hands to go fooling around
22 with the sweat shirt let's say Herva held the gun with
23 one hand. It's still heavy and Herva would have to get
24 the sweat shirt up over Bobby's head from behind Bobby.
25 You know Herva's always behind Bobby because all three

Proceedings

1 bullets hits Bobby from behind, and if Herva's coming up
2 on Bobby, trying to get that sweat shirt over Bobby's
3 head, Bobby moves forward. You can't do it. That
4 leaves one person. That is our defendant.

5 So, how does it happen. What happens here. What
6 happens here is the defendant gets out of the car.
7 Bobby gets out of the car. Defendant's glad, hey,
8 what's up. Yeah. All right. I got it. I got it.
9 Then the mandatory hug. Now, he's got him where he
10 wants him. Takes his left hand, takes the bottom of the
11 sweat shirt and yanks it up and to the left. Why to the
12 left. Because he's got to get out of the range of the
13 shot. He's got to get away. Herva's on the right.
14 He's got to get to the left and the sweat shirt goes up
15 to the point where it's over the right here and Bobby is
16 now struggling to get his right forearm back. Only way
17 to protect himself. Can't see. He's desperately
18 struggling as he's pushing the bottom of the sweat shirt
19 up around the head area so that the ear's behind the
20 right ear is open and Bobby is being pulled to the left
21 undoubtedly struggling, and going down like that, and
22 Herva's able to come up and get off that clean fatal
23 shot.

24 Now, what happens. Now, Bobby pitches forward. We
25 don't know what angle he is to the car. We know this

Proceedings

1 violent struggle is taking place. We know the neck of
2 the sweat shirt is torn. Sweat shirt is torn. The
3 defendant's trying to get control of Bobby. No way you
4 can figure out where Bobby would be positioned with
5 relation to the car. This is a an intensive violent
6 struggle. Bobby is struggling for his life. These are
7 the last moments of his life. But Bobby goes down. The
8 sweat shirt, of course, slips back over Bobby's back,
9 and folds. And now the sweat shirt is still over the
10 top of Bobby's head and you got Herva who comes and
11 shoots two more bullets. You have the one bullet, of
12 course, that leaves the three holes, and the other
13 bullet that slams directly in, and all three shots are
14 right on the money. This whole thing happened like
15 clock work. In order for it to work at all you had to
16 have two of them working together, to go like clock
17 work. What it did, it cost Bobby's his life. Bobby was
18 no saint. How many of us are saints. Bobby did things
19 he shouldn't have done. Bobby should never have been
20 involved in that gambling business. In the end it was
21 that gambling business that killed him. But just as
22 Bobby was involved in that gambling business, that
23 doesn't mean he wasn't a human being. He was a human
24 being just like the rest of us. He had a right to live
25 just like the rest of us. He had family and friends who

Proceedings

1 loved him, cared for him, and who will love and care for
2 him until the day they die, just like the rest of us.
3 He had hopes and dreams, however immature, and was aged
4 twenty-four, just like the rest of us. Until this
5 defendant, hired man, took Bobby's life. Bobby
6 Calabrese was a human being. No more care, concern,
7 compassion, basic human decency, rag doll you toss in
8 the garbage. Deliberations is like a jigsaw puzzle,
9 when you fit those pieces together, the picture is going
10 to come through, you know you can see when that picture
11 becomes clear, you're going to see this defendant for
12 who he was, for the arrogant boastful man he was. For
13 the compulsive gambler he was. For the man who dug
14 himself a hole and had no way out. A man who was at
15 least \$10,000 short. For the man who desperately wanted
16 to place two sure \$500 bets. He was upset so this
17 defendant turned to Herva Jeannot. See them conspiring
18 together during their break times. See them work it all
19 out. You're going to see the defendant lure Bobby to
20 that desolate corner of North Long Beach. You're going
21 to see the defendant grab handling Bobby. You're going
22 to see him portray him hugging Bobby and then this
23 explosion of violence, several seconds of intense
24 violent hot violence as Bobby's desperately struggling
25 for his life. The defendant struggling to keep Bobby

Proceedings

1 contained, to hold him, set him up for Herva. You're
2 going to see Bobby with that sweat shirt over his head.
3 You're going to see Bobby as the darkness set in.
4 You're going to see Bobby as the emptiness set in.
5 You're going to see Bobby as realization set in, he was
6 going to die in a matter of seconds. It wasn't a thing
7 he could do about it. See Bobby as the realization set
8 in, that he was going to die, not among people who loved
9 and cared for him, but among men who his young life, as
10 precious as it was to him, meant absolutely nothing.
11 They didn't even dislike him.

12 When that picture becomes clear to you at the end
13 of the trial, return to this courtroom, stand, face that
14 man, and hold him responsible for what he did to Bobby
15 Calabrese. Find him guilty as charged of Murder in the
16 Second Degree, intentional murder, because that is what
17 he did.

18 THE COURT: Everybody in the gallery, remain
19 seated until the jury leaves the jury box.

20 We're going to take a ten minute break and then I
21 am going to bring you back and charge you on the law.
22 Remember my admonitions. You're not to discuss this
23 case among yourselves. Follow the officer.

24 THE COURT OFFICER: Leave your note pans on
25 the chair and follow me out.

Proceedings

1 THE COURT OFFICER: We're going to take
2 approximately a ten minute break then the Court is going
3 to instruct the jury on the law.

4 (Whereupon, there was a recess in the proceedings.)

5 THE CLERK: Case on trial, indictment
6 167N-2005, People versus Mark Orlando.

7 People ready.

8 MR. HAYDEN: Ready.

9 THE CLERK: Defendant.

10 MR. LEMKE: Yes.

11 THE CLERK: Let the record reflect the
12 presence of the defendant, defense counsel and Assistant
13 District Attorney. The jury is not present at this
14 time.

15 THE COURT: Court's going to charge the jury
16 now. I think it will be, I don't know, approximately
17 forty minutes. I just ask during the course of my
18 instructing them on the law you please remain seated.
19 Of course, if you have to use the facilities, that is
20 understandable, but to the best of your ability try to
21 remain seated so the jury can concentrate on the law.

22 THE COURT OFFICER: Ready for the jury?

23 THE COURT: Yes.

24 THE COURT OFFICER: Jury entering.

25 THE CLERK: Case on trial, indictment

Proceedings

1 167N-2005, People against Mark Orlando.

2 Again, People ready?

3 MR. HAYDEN: Ready, Your Honor.

4 THE CLERK: Defense.

5 MR. LEMKE: Ready.

6 THE CLERK: Let the record reflect the
7 presence of the jury, alternates, and the defendant.

8 THE COURT: Good afternoon, ladies and
9 gentlemen. Thank you for your patience. I know it's
10 very hot in here.

11 At this time I am going to instruct you on the law
12 that you're to follow during the course of your
13 deliberations.

14 Members of the jury, it is now my duty to instruct
15 you on the law applicable to this case. Before doing
16 so, however, I would like to commend you for your
17 attention, patience, and devotion to duty as citizens of
18 the community.

19 I would also like to commend the attorneys for all
20 sides for the very able manner in which they have each
21 carried out their function as advocates.

22 We're now fast approaching that part of the trial
23 in which you're to take a more active role. Up to this
24 point, you have listened to the evidence as it has been
25 presented to you. At the conclusion of my instructions

Proceedings

1 on the law, it will become your duty to weigh that
2 evidence and decide what the facts are.

3 Trial by jury in criminal cases form the very basis
4 of the true administration of justice. It is the
5 procedure by which we calmly, rationally and
6 dispassionately endeavor to ascertain the truth. It is
7 a duty which requires the utmost fairness, honesty and
8 courage.

9 You as jurors and I as the Court have a heavy
10 responsibility, to assure that a just result is reached
11 both on the law and the facts. I shall now relate to
12 you the principles of law applicable to this case.

13 I charge you that the bringing of an indictment by
14 a Grand Jury does not in any way either prove or
15 disprove the defendant's guilt. The indictment cannot
16 be considered by you as any proof whatsoever of the
17 defendant's guilt or of any fact tending to prove his
18 guilt. The indictment is only an accusation. It is a
19 charge of criminal activity against a defendant brought
20 by the Grand Jury and serves only as the mechanism for
21 bringing the defendant to trial. The fundamental duty
22 of a jury is to determine the facts. You are a fact
23 finding body and it is for you and you alone to
24 ascertain where the truth lies. Indeed, you are the
25 sole and exclusive judges of the facts, and in that

Proceedings

1 field you are supreme and no one may invade your
2 province.

3 On the other hand, and with equal emphasis, I
4 charge you that you must accept the law as I give it to
5 you whether you agree with the law as give it to you or
6 not. You are bound to abide by it.

7 The process by which you arrive at your verdict
8 requires two steps. First, you must determine from all
9 the evidence, including exhibits, what the facts are.
10 Second, you must apply the law I give you to the facts
11 as you have determined them to be. The conclusion you
12 then reach will be your verdict. Whatever the verdict
13 may be in this case, it must be by unanimous vote of the
14 jury. In other words, all twelve of the deliberating
15 jurors must agree on the verdict.

16 It is essential that you base your verdict upon the
17 evidence and the evidence alone as you heard it from the
18 mouths of the witnesses and from the various exhibits
19 which were admitted into evidence. Under no
20 circumstances should you indulge in speculation or
21 guesswork. You're not to consider anything outside of
22 the evidence.

23 With respect to jurors who have taken notes, any
24 notes taken are only an aid to your memory, and must not
25 take precedence over your independent recollection.

Proceedings

1 Those jurors who chose not to take notes, must rely on
2 their own independent recollection and must not be
3 influenced by any notes that another juror may take.
4 Any notes you take are only for your own personal use in
5 refreshing your recollection. Notes serve merely as an
6 aid to the juror's memory. They are in no way superior
7 to a juror's recollection. Notes may not be used as an
8 authority to persuade your fellow jurors as to what a
9 particular witness did or did not say.

10 A juror's notes are not a substitute for the
11 recorded transcript of the testimony or for any exhibit
12 received in evidence. If there is a discrepancy between
13 a juror's recollection and his or her notes regarding
14 the evidence, you should ask to have the relevant
15 testimony read back, or the exhibit produced in the jury
16 room.

17 In addition, a juror's notes are not a substitute
18 for the detailed explanation I will give you of the
19 principles of law that govern this case. If there's a
20 discrepancy between a juror's recollection and his or
21 her notes regarding those principles, you should ask me
22 to explain those principles again and I will be happy to
23 do so.

24 Again, any notes taken are confidential and shall
25 not be available for examination or review by any party

Proceedings

1 or other person. After the jury has rendered its
2 verdicts we will collect the notes and destroy them.

3 In evaluating the evidence and the issues
4 presented, you should use your common sense, knowledge
5 and experience just as you would in making decisions in
6 your daily life. When I speak of knowledge and
7 experience in this context, I mean the sort of knowledge
8 and experience that an average person would acquire in
9 life.

10 Some of you, however, may have something more than
11 ordinary knowledge or experience in a certain area.
12 Indeed, it may be that you have developed a special
13 expertise in a certain area well beyond what an average
14 person would have. If you have such a special
15 expertise, and if it relates to some material issue in
16 this case, it would be wrong for you to rely on that
17 special expertise, to inject into your deliberations
18 either a fact that is not in evidence, or inferable from
19 the evidence or an opinion that could not be drawn from
20 the evidence by a person without that special
21 expertise. The reason it would be wrong to do so is
22 that you must decide this case only on the evidence
23 presented to you in this courtroom as I have already
24 instructed you.

25 Therefore, with respect to any legal issue in the

Proceedings

1 case, you must not use any special expertise you have to
2 invert into the deliberations evidence that has not been
3 presented in this courtroom during the trial.

4 You are not to be affected by sympathy or other
5 considerations outside of the evidence or by what the
6 reactions to your verdict may be. Whether it be popular
7 or unpopular, whether it pleases or displeases anyone.
8 You must decide this case solely upon the evidence and
9 render a fair and impartial verdict without fear,
10 without favor, and without sympathy.

11 You may not consider or speculate about matters
12 relating to sentence or punishment. That is a matter I
13 alone must determine under our rules of law. I charge
14 you that you are not to consider or discuss any matters
15 relating to sentence or punishment during your
16 deliberations. As I have said, your verdict is to be
17 based upon the evidence and the evidence alone. The
18 openings, summations, arguments and remarks of counsel
19 are not evidence, and may not be considered by you as
20 evidence. They are merely arguments put forth by the
21 respective lawyers in which they're telling you what
22 they believe to be the conclusions you should draw from
23 the evidence.

24 If the attorneys during the course of their
25 summations or I in my charge should allude to the facts

Proceedings

1 and your recollection of those facts disagree with the
2 attorneys or my recital of them, disregard what we say.
3 It is your recollection, understanding and evaluation of
4 the facts which govern. Remember, you are the sole
5 judge of the facts, what the facts are, and of which
6 facts you will accept in arriving at your verdict.

7 At times during the trial, I have sustained
8 objections to questions asked without permitting the
9 witness to answer or where an answer was made,
10 instructed that it be stricken from the record and that
11 you disregard it and dismiss it from your minds. You
12 may not draw any inference from an unanswered question
13 nor may you consider testimony which has been stricken
14 in reaching your decision.

15 Once again, I repeat, the law requires that your
16 verdict be based solely upon the competent evidence
17 before you. Such items as I have excluded from your
18 consideration were excluded because they were not
19 legally admissible. I have endeavored to preside
20 impartially, without influencing you in your
21 determination of the facts. It is for you to say what
22 the facts in this case are, and whether the defendant is
23 guilty or not guilty.

24 During the course of the trial, it has been
25 necessary for me to rule on the admission of evidence

Proceedings

1 and on motions made with respect to applicable law. You
2 must not infer from any such ruling I have made or from
3 anything that I have said during the course of the trial
4 that I have an opinion of this case. Any opinion of
5 mine would in any way be irrelevant since it is your
6 findings of facts and determination of guilt or lack of
7 guilt which controls.

8 There are two types of evidence, direct evidence
9 and circumstantial evidence. Evidence is direct when a
10 witness testifies to a fact from his own knowledge of
11 that fact, through one of his or her five senses.
12 Circumstantial evidence is evidence of facts which are
13 inferred, deduced or which otherwise flow from other
14 direct evidence. There is no distinction between the
15 value or weight of direct and circumstantial evidence.

16 Now, what is the difference. Let me give you an
17 example. Suppose in a particular trial one of the
18 parties has to prove that it was raining on a certain
19 morning. To do this, counsel calls a witness who
20 testifies that on the morning in question he walked to
21 the subway, and that while doing so, he saw rain falling
22 from the sky, felt it striking his face and clothes, and
23 heard it splashing on the sidewalk. This would be
24 direct evidence. Seen and felt by this witness that it
25 was raining that particular morning.

Proceedings

1 Therefore, the main question for you to decide is
2 whether that witness is telling the truth, is lying or
3 is honestly mistaken. If you find he is telling the
4 truth, then you have resolved the issue and the fact is
5 that it was raining. You do not have to draw any
6 inferences or conclusions.

7 To reiterate direct evidence is evidence of facts
8 observed by the five senses of the witness.

9 On the other hand, suppose the witness did not
10 testify that he felt rain and instead he testifies that,
11 that is, he offers direct evidence that after entering
12 the subway and getting on the train he saw passengers
13 later enter at various other stations carrying wet
14 umbrellas and having wet clothes. Form this direct
15 evidence you may draw an inference or conclusion that it
16 was raining. The point is that the inferences and
17 conclusions are facts the same as if established by
18 direct evidence.

19 In other words, circumstantial evidence is evidence
20 of facts which are inferred, deduced or which flow from
21 other direct evidence. Thus, instead directly proving
22 the particular fact in question. Circumstantial
23 evidence establishes a set of surrounding circumstances
24 from which the main fact may logically be inferred.

25 In terms of the example I have just given you, it

Proceedings

1 is direct evidence for the witness to say that on the
2 way to the subway it was not raining. It is direct
3 evidence for the witness to say, while riding on the
4 subway, I saw other people enter with wet clothes. The
5 circumstantial evidence, that is the inference, that you
6 draw from their direct testimony is that after the
7 witness entered the subway, it rained. The difference
8 therefore between direct and circumstantial evidence is
9 that circumstantial evidence requires you to take two
10 steps before concluding a fact is proven.

11 First, the facts from which the inference is to be
12 drawn must be proven by direct evidence. Second, the
13 inference to be drawn from the facts you find to have
14 been proved by the direct evidence may not be based on
15 conjecture or speculation, but must flow naturally and
16 logically from those proven facts.

17 Although you may consider only the testimony of the
18 witnesses as you have heard it in this courtroom, and
19 the exhibits which have been admitted in evidence, the
20 law does not require you to accept all the evidence I
21 have admitted even though it is competent.

22 In determining what evidence you will accept, you
23 must make your own evaluation of the testimony given by
24 each of the witnesses, and determine the degree of
25 weight you choose to give to that testimony. There is

Proceedings

1 no magical formula for doing this. Each of you bring to
2 this courtroom all of the knowledge, experience and
3 background you have acquired in your everyday lives, of
4 sizing up people and deciding whether or not they are
5 telling the truth. These same tests that you use in
6 your everyday affairs are the tests you should apply to
7 your deliberations.

8 Remember, you are also the sole judges of the
9 credibility of the witness who has appeared before you.
10 In reaching your conclusions as to what weight you will
11 give to the testimony of any witness, you may take into
12 consideration that witness's demeanor on the stand, and
13 manner of testifying. The witness's relationship to the
14 case, the witness's interest, if any, in the outcome of
15 the case. The motive, if any, the witness may have for
16 testifying truthfully or falsely. The probability of
17 the story told by the witness. Any prior acts of his
18 conduct committed by the witness. Any prior
19 inconsistent statements made by that witness. The
20 physical condition of the witness at the time of the
21 alleged incident. And any other factor which in your
22 judgment assists you in arriving at the significance of
23 witnesses' credibility.

24 Again, as we mentioned all during jury selection
25 and again here now, you will recall that certain police

Proceedings

1 officers have testified in this case. You should use
2 the same tests in evaluation their testimony as you
3 would use in evaluating the testimony of any other
4 witness. In other words, the mere fact that a witness
5 is a police officer does not require that their
6 testimony be given any greater or lesser credibility
7 than that of any other witness. You will recall that
8 numerous witnesses gave testimony concerning their
9 qualifications as an expert in their particular field.
10 Where scientific, technical or other specialized
11 knowledge will assist the jury to understand the
12 evidence, or to determine a factor in issue, our law
13 permits a witness qualified as an expert by knowledge,
14 skill, experience, training or education to state his or
15 her opinion on questions in controversy, upon the trial
16 for the information of the Court and jury.

17 Please understand that the opinions stated by the
18 experts and testified to before you were based upon
19 particular facts as the expert himself or herself
20 observed them or as the attorney who questioned him or
21 her asked such expert to assume.

22 To assist you in deciding any question in
23 controversy at trial, you may consider the opinion of
24 any expert together with the reasons given for such
25 opinion, if any. You may also consider the

Proceedings

1 qualifications and credibility of such expert. You may
2 reject an expert's opinion if you find the facts to be
3 different from those which serve as a basis for his or
4 her opinion. You may also reject an expert's opinion,
5 if after careful consideration of all the evidence in
6 the case, expert and otherwise, you disagree with the
7 expert opinion.

8 In other words, you and you alone are to form your
9 own opinion or draw your own conclusions as to any
10 question in controversy in the case.

11 There was some testimony that a witness Tommy
12 Flores has a prior driving while intoxicated and driving
13 while impaired. You may consider when a witness has
14 been convicted of a crime, or has engaged in criminal
15 conduct, and if so, whether and to what extent it
16 affects the truthfulness of that witness's testimony.
17 You're not required to reject the testimony of a witness
18 who has been convicted of a crime, or who has engaged in
19 criminal conduct, or to accept testimony of a witness
20 who has not. You may, however, consider whether a
21 witness's criminal conviction or conduct has affected
22 the truthfulness of the witness's testimony.

23 In considering credibility, if you find a
24 discrepancy between the testimony given by the various
25 witnesses, it is your duty to reconcile such discrepancy

Proceedings

1 if you're able to do so. However, if you cannot, then
2 you may determine that you will believe one witness's
3 story and not another's. In this way, you decide which
4 of the witnesses you will believe and what weight you
5 will accord their testimony. You must keep in mind that
6 the weight you give to the evidence is not dependent
7 upon the number of witnesses to a given fact, but rather
8 upon the credibility you give to the testimony of each
9 witness to that fact.

10 As I have already told you, use the knowledge you
11 have acquired in your everyday life in sizing up people
12 and in deciding whether or not they're telling the
13 truth. If you find any witness has willfully testified
14 falsely as to any material fact, you may completely
15 disregard that testimony, or you may, if you wish, give
16 credence to so much of that testimony as you find
17 supported by other credible testimony given by such
18 witness. You may accept all of such witness's
19 testimony, accept that which you have found he or she
20 has testified falsely to, or none of it, or part of it.
21 That is entirely for you to determine. Remember, it is
22 the quality of the evidence and not the quantity of
23 evidence which controls.

24 Questions are not evidence. It is the answers
25 given to the questions that constitute evidence. An

Proceedings

1 inference or suggestion contained in a question does not
2 render such a fact when the answer negates the inference
3 or suggestion. Reconcile inconsistencies in the
4 testimony if you're honestly able to do so. Do not
5 arbitrarily reject the testimony of any witness.
6 Consider each witness's testimony carefully. Determine
7 whether you will accept it or reject it in whole or in
8 part, and give it such weight as you think it is
9 rightfully entitled to.

10 By the processes which I have just described you as
11 the sole judges of the facts will determine which of the
12 witnesses you believe, what portion of their testimony
13 you accept, and what weight you will give to that
14 testimony. If you find that you're unable to agree what
15 the testimony of any particular witness was, or what any
16 portion of that testimony may have been, then you, as
17 the forelady, should send a note to the Court, and I
18 will have the testimony read back to you.

19 Also, if you find that my explanation of the law is
20 not clear in your mind, upon request I will explain the
21 law again. If you wish to see any of the exhibits
22 admitted into evidence, including photographs, maps,
23 diagrams, records, et cetera, again, the forelady should
24 send a note requesting those items.

25 Proof has been produced by the People of certain

Proceedings

1 oral statements allegedly made by the defendant as well
2 as oral statements allegedly made by the defendant which
3 were reduced to writing by Detectives McHugh, Cereghino
4 and McGinn relative to the charges against the defendant
5 which the People claim are of an inculpatory nature.
6 These are the principles of law which you must utilize
7 in considering these statements.

8 The law provides that statements made by a
9 defendant may be used in evidence against him if they
10 were made voluntarily by the defendant. The burden of
11 proving this beyond a reasonable doubt is upon the
12 People. You must first determine from all of the facts
13 and circumstances, whether the alleged statements were
14 made by the defendant. If you determine that the
15 statements were not made by the defendant, then you're
16 not to consider them in your deliberations. On the
17 other hand, if you find, beyond a reasonable doubt, that
18 the defendant did make the statements, then you must
19 consider whether they were made voluntarily. That is,
20 without compulsion and not under the influence of fear,
21 threats or other pressures exerted upon the defendant.

22 If you're satisfied beyond a reasonable doubt that
23 the defendant did voluntarily make the statements
24 introduced by the People, then you may consider the
25 statements allegedly made by him, and determine what the

Proceedings

1 contents of the statement actually was, and whether or
2 not the statements given by him were true. The
3 statements if found by you to have been made by the
4 defendant to be true would constitute direct evidence.
5 Conversely, if you're not satisfied that the defendant
6 voluntarily made the statements, then you must disregard
7 the statements. In that case, whether or not the
8 statements are true is not material and the contents of
9 the statements should not be considered by you. And you
10 must exclude them from your deliberations and not allow
11 them to influence your decision.

12 If you determine that the statements were made
13 voluntarily by the defendant, then you must consider and
14 determine another question and that is whether
15 defendant's constitutional rights were violated, in
16 obtaining the statements allegedly made by him. If the
17 statements were made in response to questioning by a
18 public servant or by a person then acting under his
19 direction or in cooperation with him while the defendant
20 was in police custody, commonly referred to as custodial
21 interrogation then the statements may not be considered
22 by you unless the defendant was first advised of certain
23 constitutional rights.

24 I charge you that the defendant was in police
25 custody on December 9th and 10th, 2004 when the

Proceedings

1 aforementioned detectives were speaking with him. If
2 you find that the defendant while in police custody was
3 interrogated by the police, then the defendant must have
4 received certain admonitions before you may consider the
5 statements in evidence against him. The law requires a
6 person who is interrogated when he is in police custody
7 must be warned, one, that he has the right to remain
8 silent. Two, that any statement he makes may be used in
9 evidence against him in court. Three, that he has the
10 right to consult an attorney and to have his attorney
11 with him during the interrogation. And, four, that if
12 he is indigent a lawyer will be appointed to represent
13 him. The warnings need not be word for word as those I
14 have given you or in the same order. But each of the
15 above warnings must be given and the substance of each
16 of the warnings must be included even though the order
17 and arrangements may be different.

18 With reference to these warnings which are required
19 to be given to the defendant, the question as to whether
20 or not such warnings were given, or whether they were
21 given correctly and completely is one for you to decide
22 from the evidence you have heard. If you find that the
23 defendant while in police custody was interrogated by
24 the police and was advised of his constitutional rights,
25 then you are to determine whether the defendant

Proceedings

1 knowingly, understandingly, and voluntarily waived his
2 constitutional rights.

3 An expressed statement that the defendant did not
4 want an attorney followed closely by the giving of a
5 statement could constitute a waiver. A valid waiver
6 will not be presumed simply from the fact that a
7 statement was eventually obtained. Actual physical
8 violence or threats are not necessary to a finding that
9 a defendant will was overborne in obtaining the waiver
10 of constitutional rights from him. Such factors as the
11 age, education and experience of the defendant may be
12 considered.

13 If you are satisfied beyond a reasonable doubt that
14 the defendant did knowingly, understandingly and
15 intelligently waive his constitutional rights, then you
16 may consider the statements allegedly made by him and
17 determine what the content of the statements actually
18 were, and whether or not the statements given by him
19 were true. The statements if found by you to have been
20 made by the defendant and to be true would constitute
21 direct evidence.

22 Conversely, if you're not satisfied that the
23 defendant waived his constitutional rights, then you
24 must disregard the statements. In that case, whether or
25 not the statements are true is not material and the

Proceedings

1 contents of the statement should not be considered by
2 you and you must exclude them from your deliberations
3 and not allow them to influence your decision.

4 However, before you can consider any statements
5 against the defendant, even if you should find that the
6 defendant admitted the crime in his statements, you must
7 find that there were some other independent evidence
8 that the crime charged was committed. The additional
9 proof to warrant a conviction based on the defendant's
10 statement may be direct or circumstantial. You must be
11 satisfied beyond a reasonable doubt by the evidence
12 outside of defendant's statements that the crime charged
13 was, in fact, committed by someone.

14 You have been permitted to hear testimony about
15 remarks made to the defendant by Detective McGinn about
16 statements allegedly made by Herva Jeannot. You're to
17 consider this testimony only when considering the
18 circumstances under which the defendant himself may have
19 been -- consider this statement only when considering
20 the circumstances under which the defendant himself may
21 have made statements and for no other purpose. You are
22 to completely disregard any statement allegedly made by
23 Herva Jeannot when considering evidence against the
24 defendant. Any statement allegedly made by Herva
25 Jeannot is not evidence against the defendant and may

Proceedings

1 never be considered as evidence against the defendant.
2 You are not to concern yourselves with whether Herva
3 Jeannot did or did not make any statements to the police
4 and if he did, what those statements may have been or
5 whether or not they were true.

6 Among the exhibits received in evidence were
7 photographs. These photographs purport to depict
8 various locations relevant to the issues in the case.
9 These photographs were received in evidence to assist
10 you in making your evaluation of the testimony relating
11 to the locations, scenes or objects depicted therein.
12 You are the sole judges of the accuracy of these
13 photographs and you are the sole judges of the weight to
14 be given to such photographs.

15 Among those photographs taken and admitted into
16 evidence were photographs involving the crime scene, and
17 also taken during the autopsy of the victim. You may
18 find them to be grim and unpleasant. However, they have
19 been admitted into evidence because these photographs
20 are relevant to the issue of cause of death.

21 I now charge and I emphasize that you're not to
22 dwell upon these photographs, that when you view them,
23 please do so quickly, calmly and unemotionally. I
24 charge you you must make your determination of the
25 weight, if any, that you may see fit to give to these

Proceedings

1 photographs objectively without emotion and without
2 prejudice.

3 Also, among the exhibits received in evidence, were
4 diagrams and maps. These diagrams and maps were
5 received in evidence to assist you in making your
6 evaluation of the testimony relating to the locations,
7 scenes or objects depicted therein. You are the sole
8 judges of the accuracy of the diagrams and maps. And
9 you are the sole judges of the weight to be given to
10 such diagrams and maps.

11 Motive is that which proves a person engaged in
12 conduct to do an act. It is the reasons which motivate
13 conduct. Motive may be good or bad. Criminal intent on
14 the other hand is the state of mind which accompanies
15 the criminal conduct or act. A person acts with
16 criminal intent when his conscious objective is to
17 engage in conduct which the law forbids. Criminal
18 intent is an essential element of the crime charged and
19 must be proved by the People beyond a reasonable doubt.
20 On the other hand, motive is not an element of the crime
21 charged. Therefore, the People have no obligation to
22 prove that the defendant had a reason or reasons to
23 commit the crime. Nevertheless, the existence of
24 motive, or the lack of motive, when established by
25 evidence, is a consideration for the jury.

Proceedings

1 For example, if you find from the proof that the
2 defendant had a motive to commit the crime charged, that
3 is a circumstance you may wish to consider as tending to
4 establish guilt. On the other hand, if the proof
5 establishes that the defendant had no motive to commit
6 the crime charged, that is a circumstance you may wish
7 to consider as tending to establish the defendant's
8 innocence of the crime charged.

9 We turn now to the constitutional safeguards
10 surrounding every person accused of a crime. The
11 defendant has plead not guilty and by that plea of not
12 guilty puts in issue each and every allegation charged
13 in the indictment. A fundamental legal principle which
14 is applicable in every criminal case is known as the
15 presumption of innocence. The law provides that the
16 defendant starts this trial with a presumption in his
17 favor, that he is innocent of the crime charged. This
18 presumption of innocence follows him throughout the
19 entire trial and remains with him until such time as you
20 find it has been overcome by proof of guilt beyond a
21 reasonable doubt. The trial began with no evidence
22 against the defendant, and the presumption of innocence
23 standing alone requires you to find the defendant not
24 guilty unless you find that the People have proven
25 beyond a reasonable doubt that the defendant is guilty

Proceedings

1 of the crime charged.

2 As I previously stated the defendant has plead not
3 guilty to the crime charged in the indictment. A plea
4 of not guilty is a denial of each and every allegation
5 in the indictment. Under our system of laws, the People
6 have the burden of proving to your satisfaction, beyond
7 a reasonable doubt, each and every element of the crime
8 with which the defendant is charged. This burden
9 remains upon the prosecution throughout the trial, and
10 never shifts to the defendant. No defendant is required
11 to prove his innocence. The defendant does not have to
12 of prove anything. I repeat, each element of any charge
13 submitted to you must be proved by the People beyond a
14 reasonable doubt.

15 The standard of proof required in every criminal
16 case, is proof of guilt beyond a reasonable doubt. That
17 does not require the people to prove the defendant
18 guilty I don't understand all possibility after doubt or
19 beyond a shadows after doubt. It requires the People to
20 establish defendant's guilt, only beyond a reasonable
21 doubt: Therefore, before you may convict the defendant,
22 each of you must be satisfied that the credibility I
23 find is sufficient to convince you beyond a reasonable
24 doubt that the defendant is in fact guilty and that the
25 defendant is in fact the person who committed the crime

Proceedings

1 charged. A doubt of the defendant's guilt to be a
2 reasonable doubt must be a doubt for which some reason
3 can be given. The doubt to be reasonable must therefore
4 arise because of the nature and quality of the evidence
5 in the case, or from the lack or insufficiency of the
6 evidence in the case. The doubt to be a reasonable
7 doubt should be one that a reasonable person in a matter
8 of this importance would be likely to entertain because
9 of the evidence or because of the lack or insufficiency
10 of the evidence notice case. A reasonable doubt our law
11 says is an actual doubt. One which you are conscious of
12 having in your mind after you have considered all the
13 evidence in the case, or lack of evidence in the case.
14 If after doing so, you then feel uncertain and not fully
15 convinced of the defendant's guilt, you are also
16 satisfied that in entertaining such a doubt, you are
17 acting as a reasonable person should act in a matter of
18 this importance, then that is a reasonable doubt which
19 the defendant is entitled today the benefit. Therefore,
20 the first duty of each juror is to consider and weigh
21 all the evidence in the case, and decide which evidence
22 you believe is credible and worthy of your
23 consideration. The next duty of each juror is to
24 determine whether he or she has a reasonable doubt of
25 the defendant's guilt as I have defined that term to

Proceedings

1 you. If in doing so you find that the People have not
2 proven the defendant's guilt beyond a reasonable doubt
3 you must find the defendant not guilty. On the other
4 hand, if you're satisfied that the People have proven
5 the defendant's guilt beyond a reasonable doubt, you
6 must find the defendant guilty.

7 The defendant did not testify in this case. I
8 charge you that the fact that he did not testify is not
9 a factor from which any inference unfavorable to the
10 defendant may be drawn.

11 I will now charge you on accessorial liability.
12 Our law recognizes that two or more individuals can act
13 jointly to commit a crime. And that in certain
14 circumstances each can be held criminally liable for the
15 acts of the other. In that situation, those persons can
16 be said to be acting in concert with each other. Our
17 law defines the circumstances under which one person may
18 be criminally liable for the conduct of another. That
19 definition is as follows.

20 When one person engages in conduct which
21 constitutes an offense, another person is criminally
22 liable for such conduct when acting with the state of
23 mind required for the commission of that offense, he
24 solicits, requests, commands, importunes, or
25 intentionally aids such person to engage in such

Proceedings

1 conduct.

2 In this case, in order for the defendant to be held
3 criminally liable for the conduct of another, you must
4 find beyond a reasonable doubt that he acted with the
5 state of mind required for the commission of the crime.
6 And that he intentionally aided another person to engage
7 in that crime. If it is proven beyond a reasonable
8 doubt that the defendant is criminally liable for the
9 conduct of another, the extent or degree of the
10 defendant's participation in the crime does not matter.
11 A defendant proved beyond a reasonable doubt to be
12 criminally liable for the conduct of another in the
13 commission of a crime is as guilty of the crime as if
14 the defendant personally had committed every act
15 constituting the crime.

16 The People have the burden of proving beyond a
17 reasonable doubt that the defendant acted with the state
18 of mind required for the commission of the crime, and
19 either personally or by acting in concert with another
20 person committed each of the remaining elements of the
21 crime.

22 As you know, the People contend the defendant acted
23 in concert with Herva Jeannot who is not on trial here.
24 You must not draw any inference from his absence. You
25 must not allow the absence to influence your verdict.

Proceedings

1 You are here to determine whether the People have proven
2 beyond a reasonable doubt that the defendant on trial is
3 guilty of a charged crime.

4 Now I will charge you on the specific count. The
5 only count is murder in the second degree. Under our
6 law, a person is guilty of murder in the second degree
7 when with intent to cause the death of another person,
8 he causes the death of such person.

9 The term intent used in this definition has its own
10 special meaning in our law. I will now give you the
11 meaning of that term. Intent means conscious objective
12 or purpose. Thus a person acts with intent to cause the
13 death of another when that person's conscious objective
14 or purpose is to cause the death of another.

15 In order for you to find the defendant guilty of
16 this crime, the People are required to prove from all
17 the evidence in the case beyond a reasonable doubt both
18 of the following two elements.

19 One, that on or about the third day of December,
20 2004, in the County of Nassau, the defendant Mark
21 Orlando individually and aiding and abetting and being
22 aided and abetted by Herva Jeannot caused the death of
23 Robert Calabrese.

24 And, two, that the defendant Mark Orlando did so
25 with the intent to cause the death of Robert Calabrese.

Proceedings

1 Therefore, if you find that the People have proven
2 beyond a reasonable doubt both of those elements, you
3 must find the defendant guilty of the crime of Murder in
4 the Second Degree. On the other hand, if you find that
5 the People have not proved beyond a reasonable doubt
6 either one or both of these elements, you must find the
7 defendant not guilty of the crime of Murder in the
8 Second Degree.

9 As I have previously charged you, your verdict must
10 be unanimous. That is, all twelve of the deliberating
11 jurors must agree on the verdict.

12 Juror number one has been designated as the
13 foreperson and will have the task of seeing that your
14 deliberations are conducted in an orderly fashion and to
15 report to the Court your questions, requests and your
16 final determination.

17 It is your duty as jurors to consult with one
18 another, and to deliberate with a view to reaching an
19 agreement if you can do so without violence to your
20 individual judgment. Each of you must decide the case
21 for yourselves but must do so only after impartially
22 considering the evidence along with your fellow jurors.
23 In the course of your deliberations, do not hesitate to
24 re-examine your own views, and change your opinion if
25 you're honestly convinced it is erroneous. Do not

Proceedings

1 surrender your on honest conviction as to the weight or
2 effect of the evidence solely because of the opinions of
3 your fellow jurors or for the mere purpose of returning
4 a verdict. There is no fixed procedure for you to
5 follow during your deliberations.

6 However, you should proceed in such a way that each
7 juror has an equal opportunity to express his or her
8 views. You're attitude at the outset of your
9 deliberations is important. It is seldom helpful for a
10 juror upon entering the jury room to announce an
11 emphatic opinion on the case or a determination to stand
12 for a certain verdict. When a juror does that at the
13 outset, individual pride may become involved and the
14 juror may later hesitate to recede from an announced
15 position even when shown it is incorrect. You're not
16 partisans, you're the impartial judges of the facts.
17 Your sole interest is to ascertain the truth from the
18 evidence in the case. Now is the time to withstand any
19 urge or tendency to base your decision on anything other
20 than the facts which you have heard presented and my
21 instructions regarding them. You must consider only the
22 evidence in this case, the testimony and the exhibits,
23 and you must apply to that evidence the law as I have
24 given it to you. Your verdict will then be determined
25 by the conclusion that you reach, no matter whom the

Proceedings

1 verdict helps or hurts.

2 This case is important. It is important to the
3 defendant, it is important to the People. It is
4 important that justice be done in all events to the
5 defendant and to the People. Make sure whatever your
6 verdict is you return it is free from passion,
7 prejudice, sympathy or any other improper motive.

8 We will have a verdict sheet that will go into the
9 jury room with you. I know your lunch is here. You
10 will eat and then you will commence your deliberations.

11 THE CLERK: Retire the jury. The alternates
12 will stay behind. The alternate will stay behind. The
13 twelve jurors will follow the court officer.

14 THE COURT OFFICER: Follow me out. Take your
15 note pads with you.

16 Three alternate jurors remain seated for a moment.

17 (Whereupon, the following takes place outside
18 the presence of the deliberating jury.)

19 THE COURT: As alternates it's very difficult
20 because now your roll is you will stay together, but you
21 cannot discuss the case between yourselves or with
22 anyone else. Okay: So, it's a difficult position to be
23 in but we commend you for your service.

24 I am going to keep you. You're going to get your
25 lunch, and you will be kept together. But at this point

Proceedings

1 you cannot deliberate. You can't discuss the case in
2 any way amongst yourselves. Okay.

3 Do you have a court officer?

4 THE CLERK: Yes, we do.

5 (Whereupon, the following takes place outside the
6 presence of the jury.)

7 THE COURT: Are there any exceptions or
8 objections to the charge?

9 MR. HAYDEN: None.

10 MR. LEMKE: No.

11 THE COURT: Additional requests?

12 MR. LEMKE: None, Your Honor.

13 MR. HAYDEN: No, Your Honor.

14 THE COURT: We discussed the release of the
15 alternates.

16 MR. LEMKE: Yes, Your Honor.

17 THE COURT: Do both sides consent that if
18 there's a notes from the jury for the exhibits, the
19 officer can enter the jury room, we don't have to
20 reconvene, we can have the exhibits brought into the
21 room for them?

22 MR. LEMKE: Yes.

23 MR. HAYDEN: Yes.

24 THE COURT: Anything further?

25 THE CLERK: That is it.

Proceedings

1 (Jury deliberations.)

2 THE CLERK: Continued case on trial,
3 indictment 167N-05, People versus Mark Orlando.

4 People ready?

5 MR. HAYDEN: People ready, Your Honor.

6 THE CLERK: Defendant ready?

7 MR. LEMKE: Defendant ready, Your Honor.

8 THE CLERK: Let the record reflect the
9 presence of Mr. Orlando. The jury is not in the
10 courtroom at this time.

11 THE COURT: Before the jury gets here, we have
12 a note. I have marked it as Court exhibit number XII.
13 They asked to observe the gun. That's been done. They
14 want the gambling records. Already given to them. All
15 written statements to police by the defendant. That's
16 been given to them. Surveillance video, viewing of cars
17 and storage vicinities. That is set up here to show
18 them now out here in the courtroom. View of sweat shirt
19 on the dummy. The demonstrative evidence referred to
20 that's been given to them. They'll be instructed that
21 is not an exhibit that they can tamper with or remove
22 the sweat shirt. Picture of Bobby after being shot. I
23 am going to instruct them that the Court intends to give
24 them the crime scene photos of the victim, and if they
25 want anything more than that they should alert us via

Proceedings

1 letter from the forelady.

2 Do you want to be heard with respect to that.

3 MR. LEMKE: Only regarding the dummy with the
4 sweat shirt. I had objected to that coming into
5 evidence. The Court overruled my objection and now I am
6 thinking about it, ruling it to be used for
7 demonstrative purposes only. So, if the jury has that
8 in the deliberating room, deliberating, it's for
9 demonstrative purposes only, they should be able to move
10 that sweat shirt around and determine whether or not the
11 angle of the first shot is consistent with that. I mean
12 why is that in evidence except for demonstrative
13 purposes. You can't sit there and limit them, tell them
14 you can't move it in different angles of how a shot can
15 be made.

16 So, initially my response would be they couldn't,
17 but that is evidence that is brought in for
18 demonstrative purposes. It's not, for example, as the
19 sweat shirt was, I think People's 35, but that is one
20 thing. If they start speculating to that, once my
21 objection is overruled, now what is happening is exactly
22 what I thought would happen now. It's demonstrative.
23 It's in evidence. You have a dummy in evidence with
24 arrows that were pointed to various bullet tracks. They
25 want to move the sweat shirt around, I don't understand

Proceedings

1 how they couldn't be asked to do that in a demonstrative
2 setting.

3 I think they should be able to use that for that
4 purpose.

5 MR. HAYDEN: We believe it was put into
6 evidence to demonstrate the way two bullets went through
7 the back of the sweat shirt, and into the left side of
8 Bobby's head. No other purpose. And, for the jurors to
9 manipulate the sweat shirt at this point would be
10 distorting the purpose for which the exhibit was
11 introduced in the first place.

12 THE COURT: Your objection is noted for the
13 record. It's overruled. The Court will not allow the
14 jury to take that evidence and start basically creating
15 their own exhibit which becomes something that is not in
16 evidence, but rather they'll be instructed that that was
17 for the limited purpose for which it was offered.

18 Your objection is noted for the record.

19 MR. LEMKE: Right. But also, Your, Honor on
20 redirect Mr. Hayden pulled up that sweat shirt to the
21 point almost over the head so shots could be seen
22 through the neck. So, there's testimony to that. To
23 tell they can't pull it up as testified to, again, you
24 have my objection.

25 THE COURT: Yes. Objection overruled.

Proceedings

1 The Court intends to answer these requests of the
2 jury as I have just indicated. Show them the video and
3 then because of the lateness of the day, the Court has
4 no choice but to release the jury until tomorrow. I
5 will charge them with respect to that. They'll be
6 ordered to reconvene at nine a.m. tomorrow.

7 THE COURT OFFICER: Ready for the jury?

8 THE COURT: Yes, ma'am.

9 THE COURT OFFICER: Jury entering.

10 THE CLERK: Continued case on trial,
11 indictment 167N-05, People versus Mark Orlando.

12 People ready?

13 MR. HAYDEN: Ready, Your Honor.

14 THE CLERK: Defense ready?

15 MR. LEMKE: Defendant ready.

16 THE CLERK: Let the record reflect the
17 presence of Mr. Orlando, the jurors and the alternates.

18 THE COURT: Good afternoon, ladies and
19 gentlemen.

20 I received a note from the jury. We marked it as
21 Court exhibit XII wherein it asks to observe the gun,
22 gambling records. We have done both of those requests.
23 We met most of those requests. All written statements
24 to police by defendant. We gave you that. Surveillance
25 video, viewing of cars and storage vicinities. We're

Proceedings

1 about to do that for you. View of sweat shirt that was
2 on dummy.

3 That is demonstrative evidence that the Court
4 admitted. I put that in there with you. You're not to
5 manipulate it in any way. You apply the testimony to
6 that exhibit.

7 Picture of Bobby after being shot. The Court
8 intends to give you the crime scene photos of the victim
9 on the street. If the Court has not met your request or
10 if there is something additional you want, just put it
11 in a letter, send it to me, and I will meet that
12 request.

13 At this point, we're going to play the video for
14 you. I am going to sit over here so I can see it.

15 Mr. Hayden, will you play the tape.

16 MR. HAYDEN: Yes, Your Honor.

17 (Whereupon, the requested video in evidence was
18 play in open court.)

19 THE COURT: Ladies and gentlemen, at this
20 time, we're going to break for the evening. I ask
21 everybody in the gallery to please remain seated while
22 the jury leaves the courtroom.

23 I am going to instruct you specifically now that
24 you're a deliberating jury with respect to rules you
25 must adhere to until you come back tomorrow. I already

Proceedings

1 told you, I will provide you with what you requested in
2 your letter, and if there's something additional or we
3 didn't provide you with the right things you're looking
4 for, let me know in the a letter tomorrow morning.

5 Members of the jury, today's court session is now
6 drawn to a close, and I am about to excuse you for the
7 day. You must return tomorrow, Tuesday, at nine a.m.
8 The law requires that before I excuse you, I review with
9 you the rules you must follow over the course of this
10 recess. These rules are designed to guarantee the
11 parties a fair trial and are generally the same ones you
12 were required to follow prior to deliberations, but the
13 law requires that I restate them, and at this stage in
14 order to emphasize their importance.

15 The reason for the emphasis is that you're in a
16 critical stage. You're in the process of
17 deliberations. You're not being sequestered. That
18 means you're not being kept together overnight where we
19 can have greater assurance that you will follow the
20 rules. You are being permitted to go home after
21 deliberations have begun. There may now be a greater
22 temptation, for example, to discuss the case with
23 someone else or to go to the scene. You must resist
24 that temptation to discuss the case with someone else or
25 to visit the scene. It would not only violate my order

Proceedings

1 but also violate the oath you took to follow rules.

2 The rules are as follows: Deliberations must be
3 conducted only in the jury room when all jurors are
4 present. Therefore, all deliberations must now cease
5 and must not be resumed until all twelve of you have
6 returned and are together again in the jury room.

7 During the recess, do not discuss the case among
8 yourselves or with anyone else. You remain under
9 obligation not to request, accept, agree to accept or
10 discuss with any person the receiving or accepting of
11 any payment or benefit in return for supplying any
12 information concerning the trial.

13 You must promptly report to me any attempts by any
14 person to converse with you about the case, or to
15 influence you or any other member of the jury. You must
16 not visit or view the place where the crime charged was
17 allegedly committed or any other place discussed in the
18 testimony. You must not read, view or listen to any
19 accounts or discussions of the case reported in any news
20 media.

21 Now ladies and gentlemen, I want you to understand
22 why these rules are so important. The law does not want
23 you to talk to anyone about the case or permit anyone to
24 talk to you about the case because only the twelve of
25 you are authorized to render a verdict in this case.

Proceedings

1 Only you have been found to be fair, and only you have
2 promised to be fair. No one else has been so
3 qualified. The law also does not permit you to visit a
4 place discussed in the testimony.

5 First, you cannot always be assure that the place
6 is in the same condition as it was on the day in
7 question. Second, even if it were in the same
8 condition, once you go to a place discussed in the
9 testimony to evaluate the evidence in light of what you
10 see you become a witness not a juror. As a witness, you
11 may now have an erroneous view of the scene that is not
12 subjected to cross examination by either party. That is
13 not fair.

14 Finally, the law requires that you not read or
15 listen to any news accounts of the case should there be
16 any. You must decide this case on the evidence
17 presented in this courtroom. You are not to decide the
18 case based on some reporter's view or opinion.

19 Again, I trust you understand and appreciate the
20 importance of following these rules, and in with your
21 oath and promise to me, I know you will do so.

22 At this time, folks, you're going to follow the
23 officers instructions. Same rules apply to the
24 alternates. All be back here tomorrow at nine o'clock.
25 We will take a lunch order and resume deliberations.

Proceedings

1 Have a good evening.

2 THE COURT OFFICER: Jurors, please follow me
3 out.

4 (Whereupon, the following takes place outside the
5 presence of the jury.)

6 THE COURT: Mr. Lemke, any objection?

7 MR. LEMKE: No, Your Honor. Thank you.

8 THE COURT: Mr. Hayden, anything.

9 MR. HAYDEN: No, Your Honor.

10 THE COURT: Court is in recess till nine
11 o'clock tomorrow morning. We will continue
12 deliberations using this courtroom.

13 (Whereupon, the trial was adjourned to July 14,
14 2005.)

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